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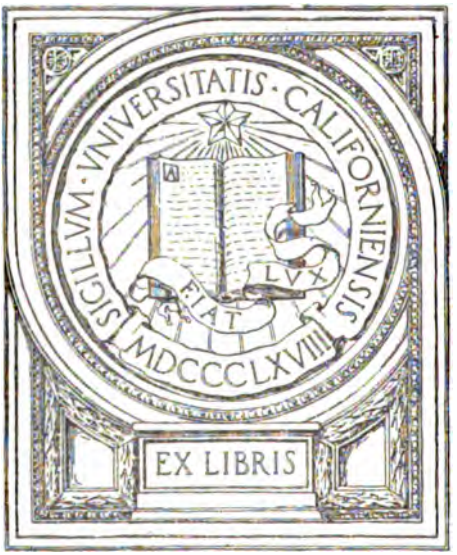

Berton Einstein'o

CASES ON THE LAW

OF

BILLS, NOTES, AND CHEQUES.

CASES ON THE LAW

OF

BILLS, NOTES, AND CHEQUES.

To accompany this volume.

ELEMENTS OF THE LAW OF BILLS, NOTES, AND CHEQUES, FOR STUDENTS. By MELVILLE M. BIGELOW, PH.D.

CALIFORNIA

CASES

ON

THE LAW OF BILLS, NOTES, AND CHEQUES

TO ACCOMPANY THE EDITOR'S WORK
ON THAT SUBJECT

EDITED BY

MELVILLE M. BIGELOW
PH.D. HARVARD

BOSTON
LITTLE, BROWN, AND COMPANY
1894

HF1259
B3-

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UNIVERSITY PRESS
JOHN WILSON AND SON, CAMBRIDGE, U.S.A.

NOTE.

THE cases contained in this volume are selected to accompany the editor's work on the Law of Bills, Notes, and Cheques, of the Students' Series; and they follow the order of the text of that book.

The editor has generally rewritten the headnotes of the cases, putting them of set purpose in the form of briefly-stated rules of law. The headnotes thus furnish a text for what follows, and help to make the report of the case complete after the manner of original law reports. They cannot tempt the student to cut short his work and take them as a substitute for what follows, or even as an epitome of it, for the deduction of rules is no more than an incident of the study of cases.

Statements of fact, too, when not contained in the opinion, have often been rewritten, especially when clearness and space could be gained. Matter foreign to the subject in hand has been omitted, as well from the opinion as from the statement preceding, where, and only where, the omission could not affect the completeness of what was left.

The report of a case usually consists of five separable parts; and to bring about the best results the report

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should be studied accordingly, part by part, in natural order. The parts, and their order of sequence, are these: —

1. Nature of the action (*e. g.*, indorsee against maker of a note).
2. Essential facts.
3. Point or points in dispute.
4. Decision (*e. g.*, instrument not negotiable).
5. Ground of decision.

Taking up the work accordingly, the student should not leave a case until he can state it, without hesitation, clearly and effectively from beginning to end.

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UNIV. OF CALIFORNIA

CASES

ON

BILLS, NOTES, AND CHEQUES.

DUNLOP *v.* SILVER.

Circuit Court, District of Columbia, July, 1801. 1 Cranch, 367.

A remote indorser of a negotiable promissory note, in Virginia law, is liable to the holder.[1]

James Cavan made a promissory note payable to Silver et al. or order, sixty days after date, in the sum of $600, for value received, negotiable at the Bank of Alexandria. Silver et al. indorsed the note to Downing & Dowell, who indorsed it, 'Pay the contents to John Dunlop or order.' Dunlop had obtained judgment and execution against the maker, who took the oath of an insolvent debtor. He now sued Silver as indorser.

Two Counts. 1. A special count stating the making and indorsing, the suit, judgment, execution, and insolvency of the maker, by reason whereof the defendant became liable,

[1] At the February term, 1803, of the Supreme Court of the United States, it was held, contrary to the decision in this case, on error to the same court, that by the law of Virginia an indorsee of a promissory note could not maintain an action against a remote indorser for want of privity. Mandeville *v.* Riddle, 1 Cranch, 290. The case supra, thus overruled, is reported in Cranch as an Appendix to Mandeville *v.* Riddle. Its value consists entirely in its exhaustive historical review of the authorities, going back as it does to the very beginning of actions in the Superior Courts.

etc. 2. Indebitatus assumpsit for money had and received. Plea, non assumpsit, and verdict for the plaintiff subject to the opinion of the court whether the holder can maintain an action against the remote indorser of a promissory note, under Virginia law. The statute of 3 & 4 Anne, c. 9, was not in force in that State; but an Act of 1786, c. 29, existed, by which 'an action of debt may be maintained upon a note or writing by which the person signing the same shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to another,' and that 'assignments of bonds, bills, and promissory notes, and other writings obligatory, for payment of money or tobacco, shall be valid; and an assignee of any such may thereupon maintain an action of debt in his own name, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant.'

[The decision by KILTY, C. J., and CRANCH, Assist. J., was in favor of the plaintiff, an opinion — by which judge is not stated — having been delivered which occupies nearly a hundred pages in Cranch. No question of the kind is ever raised nowadays, and there is no occasion to follow, in detail, the elaborate examination of the subject made by the court. It is enough, so far as that is concerned, to remind the student that the case is an invaluable storehouse of the law of bills of exchange and promissory notes, from its first emergence in the law reports down to the time of the decision. Nowhere else can there be found such an exhaustive review of the authorities. It must suffice here to make some important extracts from the opinion, with a view to showing how the custom of merchants touching these instruments came to be grafted upon the law of England].

[P. 368.] A distinction seems to have been made very early between the contracts of merchants (especially of foreign merchants) and those of other people. Nearly six hundred years ago we find their 'old and rightful customs' protected by the great charter of English liberties. Magna

Charta, c. 30. . . . In the 13 Edw. VI. 9, 10, cited by Molloy, book 3, c. 7, § 15, it is said that 'a merchant stranger made suit before the King's Privy Council, for certain bales of silk feloniously taken from him, wherein it was moved that this matter should be determined at common law; but the Lord Chancellor answered, that this suit is brought by a merchant who is not bound to sue according to the law of the land, nor to tarry the trial of twelve men.' [The argument is that the custom of merchants had come to be treated, before the statute of Anne, as part of the common law.]

. . . . . .

[P. 375.] Forms of pleading often tend to elucidate the law. By observing the forms of declarations which have from time to time been adopted in actions upon bills of exchange, we may perhaps discover the steps by which the courts allowed actions to be brought upon them as substantive causes of action, without alleging any consideration for the making or accepting them. The first forms which were used take no notice of the custom of merchants as creating a liability distinct from that which arises at common law, but by making use of several fictions bring the case within the general principles of actions of assumpsit. The oldest form which is recollected is to be found in Rastell's Entries,[1] fol. 10 (*a*), under the head 'Action on the case upon promise to pay money.' . . . This declaration sets forth that A complains of B, &c., for that whereas the said A, by a certain I C, his sufficient attorney, factor, and deputy in this behalf, on such a day and year, at L, at the special instance and request of the said B, had delivered to the said B, by the hands of the said I C, to the proper use of the said B, £110 8*s.* 4*d.*, lawful money of England; *for which* said £110 8*s.* 4*d.*, so to the said B delivered, he, the said B, then and there to the said I C (then being the sufficient

[1] Published at first in the year 1564, but later editions contain the case below, of 37 Eliz.

attorney, factor, and deputy of the said A in this behalf) faithfully promised and undertook that a certain John of G well and faithfully would content and pay to Reginald S (on such a day and year, and always afterwards, hitherto the sufficient deputy, factor, and attorney of the said A in this behalf) 443¾ ducats, on a certain day in the declaration mentioned. And if the aforesaid John of G should not pay and content the said Reginald S the said 443¾ ducats, at the time above limited, that then the said B would well and faithfully pay and content the said A £110 8*s.* 4*d.*, lawful money of England, with all damages and interest thereof, whenever he should be thereunto by the said A requested. It then avers that the said 443¾ ducats were of the value of £110 8*s.* 4*d.*, lawful money of England, that John of G had not paid the ducats to Reginald S, and that if he had paid them 'to the said R [eginald], I, B and their associates, or to either of them, then the said 443¾ ducats would have come to the benefit and profit of the said A. Yet the said B, contriving the aforesaid A of the said £110 8*s.* 4*d.*, and of the damages and interest thereof, falsely and subtly to deceive and defraud, the same or any part thereof, to the said A although often thereunto required, according to his promise and undertaking aforesaid, had not paid, or in any manner contented, whereby the said A, not only the profit and gain which he, the said A, with the said £110 8*s.* 4*d.* in lawfully bargaining and carrying on commerce might have acquired, hath lost; but also the said A, in his credit towards divers subjects of our lord the king (especially towards R H and I A, to whom the said A was indebted in the sum of £110 8*s.* 4*d.*, and to whom the said A had promised to pay the same £110 8*s.* 4*d.* at a day now past, in the hope of a faithful performance of the promise and undertaking aforesaid), is much injured, to his damage,' &c. This declaration seems to have been by the indorsee of a bill of exchange against the drawer. . . . A is supposed to make I C his attorney for the purpose of paying £110 to B and to receive a promise from B that John of G

should pay to Reginald S 443 ducats. And A is also supposed to have made Reginald S his attorney for the purpose of receiving the ducats. . . . [These and the like allegations are considered to be fictions.]

. . . . . .

[P. 377.] In the declaration of payee *v.* acceptor, fol. 338 (*a*), [of Rastell], the foreign merchant who paid the 1400 crowns to the drawer of the bill in France, to be remitted to the plaintiff (the payee) in England, is stated to be the plaintiff's factor; and the drawer of the bill is stated to be the factor of the defendant (the acceptor); so that the plaintiff, by his factor, is supposed to pay to the defendant, through the medium of the defendant's factor, the 1400 crowns, in consideration of which it is averred that the defendant in England promised the plaintiff to pay him £414 8*s.* 4*d.*, lawful money of England.

This declaration sets forth that whereas the plaintiff on the tenth of June, 37 Eliz., at Rochelle in France, in parts beyond seas, by the hands of a certain T S, then the factor of the plaintiff, at the request of a certain R W, then the factor of the defendant, delivered and paid to the said R W, then the factor of the defendant, to the use of the defendant, as much ready money as amounted to 1400 French crowns of the money of France, in parts beyond sea, at the rate of 5*s.* 11*d.*, lawful money of England, for each French crown. And thereupon the said R W, at Rochelle aforesaid, then delivered to the said T S three bills of exchange, viz., first, second, and third; in the first of which bills of exchange the said R W requested the defendant to pay to the plaintiff at L £414 8*s.* 4*d.*, lawful money of England, at the end of thirty days next after sight of that bill of exchange (the second and third bills of exchange to the plaintiff not paid). It then sets forth the tenor of the second and third bills, and then avers that the defendant, on the day and year first aforesaid, at the city of E. . . . *in consideration thereof*, undertook, and to the plaintiff then and there faithfully

promised, that he, the defendant, will and faithfully would pay to the plaintiff, to the plaintiff's use, at the city of E . . . by way of exchange, *according to the usage of merchants*, the aforesaid £414 8*s.* 4*d.*, lawful money of England, at the end of thirty days next after sight of any of the bills of exchange aforesaid; and the plaintiff in fact saith that afterward, viz., on the 1st of September in the year aforesaid, at, etc., the first of the said bills came to the sight of, and was then and there shown to, the defendant, yet the defendant not regarding, etc., but contriving, etc., did not pay the said £414 8*s.* 4*d.*, etc., at the end of the thirty days [1] etc., whereby the defendant lost the benefit of trading with the said £414 8*s.* 4*d.*, etc., to his damage £600.

In this declaration it will be perceived that the custom of merchants is not alleged as the foundation of the action or the cause of liability of the defendant. Nor is it stated that the defendant accepted the bill. But the plaintiff grounds his action upon the defendant's promise to pay the amount mentioned in the bill, in consideration of 1400 crowns paid to his use in France, and in consideration that his factor had drawn and delivered the bills to the plaintiff's factor. This idea of factorage is probably a fiction introduced for the purpose of adapting the custom of merchants to the common-law forms, and to show a sufficient consideration for the assumpsit. The question of factorage was not traversable. . . . This fiction might perhaps be considered as part of the custom of merchants; but at any rate it seems to have been considered necessary in order to create that degree of privity between the payer and the acceptor which at that time was supposed necessary to support the action of assumpsit.

But this and the former are declarations at common law. . . . They show also that if privity of contract was necessary at common law to support the action of assumpsit, the law would presume a privity, or at least would presume

[1] Observe that 'usance' is not added. It seems that added time was really *grace*; i. e., indulgence at the choice of the holder.

facts which constituted a privity, between the payee and acceptor, or between an indorsee and a drawer of a bill of exchange.

. . . . . .

[After reviewing later precedents before the statute of Anne, in which the fictions more or less disappear, it is stated that in these later forms the liability of defendant under the custom was thought a sufficient consideration to raise an assumpsit without averring those intermediate steps which might be regarded as the links of the chain of privity connecting the plaintiff with the defendant. The reason of this change, it is added, was probably the consideration that those intermediate links were only fictions or presumptions of law, which were never necessary to be stated. All the foregoing related to foreign bills.]

[P. 380.] It is not ascertained exactly at what time *inland bills* first came into use in England, or at what period they were first considered as entitled to the privileges of bills of exchange under the law merchant. But there was a time when the law merchant was considered as 'confined to cases where one of the parties was a merchant stranger,' 3 Wooddeson, 109, and when those bills of exchange only were entitled to its privileges one of the parties to which was a foreign merchant. . . . In the case of Bromwich *v.* Loyd, 2 Lutw. 1585 (Hil. 8 Wm. III. C. B.), Chief Justice Treby said that 'bills of exchange *at first* were extended only to merchants strangers trading with English merchants; and afterwards to inland bills between *merchants* trading one with another here in England; and after that to all traders and dealers, and of late to all persons trading or not.' . . .

. . . Kyd, in his Treatise on Bills, p. 13 (Dublin edition, 1791), speaking of *promissory notes*, says, 'the period of their introduction *appears* to have been about thirty years before the reign of Queen Anne;' but the only authority he cites is 6 Mod. 30 (2 Anne), the case of Buller *v.* Crips

. . . in which Lord Holt says he had consulted two of the most famous merchants in London, who informed him that 'it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years.' . . . It is certain that promissory notes were in use upon the continent in those commercial cities and towns with which England carried on the greatest trade long before that period, and were negotiable under the custom of merchants in the countries from whence England adopted the greater part of her commercial law. They were called bills obligatory, or bills of debt, and are described with great accuracy by Malynes, in his Lex Mercatoria, pp. 71, 72, etc., where he gives the form of such a bill, which is copied by Molloy in p. 447 (7th edition, London, 1722), and will be found in substance exactly like a modern promissory note. . . .

. . . . . .

As Malynes says nothing of inland bills, and yet is so very particular respecting promissory notes, the probability is, that the antiquity of the latter is greater than that of the former, and that they were more certainly within the custom of merchants. . . .

. . . . . .

[P. 384.] The time when inland bills and promissory notes began to be in general use in England was probably about the year 1645 or 1646; and their general use at that time may be accounted for by the facts stated in Anderson's Hist. of Commerce, vol. 1, pp. 386, 402, 484, 492, 493, 519, and 520. . . . [Here follow quotations from the book just cited, based on 'a scarce and most curious small pamphlet, printed in 1676, entitled "The mystery of the new-fashioned goldsmiths, or bankers, discovered," in eight quarto pages.' The court then proceeds:]

[P. 386.] This short history of the goldsmiths will account for the sudden increase of paper credit after the

year 1645, and renders it extremely probable that inland bills and promissory notes were in very general use and circulation. Indeed, we know that to be the fact from the cases in the books, upon examining which we shall find that there was no distinction made between inland bills of exchange and promissory notes; they were both called bills; they were both called notes; sometimes they were called 'bills or notes.' Neither the word 'inland' nor the word 'promissory' was at that time in use as applied to distinguish the one species of paper from the other. . . . [The argument proceeds that promissory notes were within the custom of merchants before the statute of Anne. Among a multitude of cases the following, Carter *v.* Palmer, 12 Mod. 380, anno 1700, is quoted:]

[P. 402.] 'Palmer had given a *note* under his hand in this form: "I promise to pay the *bearer* so much money on demand." Plaintiff brings his action, grounding it upon the custom of merchants, as if it were a bill of exchange, *and avers no consideration.* After verdict, upon motion in arrest of judgment, Holt, Chief Justice: "We will take such a note prima facie for evidence of money lent; and though they have declared on the custom, yet we must take care that by such a drift the law of England be not changed, by making *all* notes bills of exchange." But *all* seemed to agree if it were made payable to him *or order,* the defendant by that form had made it negotiable, and by consequence he would be liable to the action of assignee in his own name; for if a man who is no merchant will draw a bill of exchange, he is suable upon it according to the custom of merchants, for he makes himself a merchant pro tanto. And inland bills were not known till trade grew to a great height; and when they obtained, they received the same law with outlandish bills. . . . Et adjorn.'

. . . . . .

[P. 408.] But let us proceed to examine the case of Clerke *v.* Martin, Pasch. 1 Anne, B. R., 2 Ld. Raym.

757; 1 Salk. 129, upon which alone is founded the assertion in modern books that before the statute of Anne promissory notes were not assignable or indorsable over within the custom of merchants, so as to enable the assignee to bring an action in his own name against the maker. The case is thus reported by Lord Raymond:

'The plaintiff brought an action upon his case . . . ; one count was upon a general indebitatus assumpsit . . . ; another was upon the custom of merchants as upon a bill of exchange, and showed that the defendant gave a note . . . by which he promised to pay to the plaintiff or his order, etc. . . . And it was moved in arrest of judgment that this note was not a bill of exchange within the custom of merchants, . . .

. . . . . .

'But Holt, Chief Justice, was totis viribus against the action, and said that this could not be a bill of exchange; that the maintaining of these actions upon such notes were innovations upon the rules of the common law, and that it amounted to a new sort of specialty unknown to the common law, and invented in Lombard street, which attempted, in these matters of bills of exchange, to give laws to Westminster Hall.' . . .

[Judgment in that case was given for the defendant. Several cases followed, the last case before the statute being Buller *v.* Crips, 6 Mod. 29 (Mich. 2 Anne, 1703), a suit by an indorsee of a promissory note against the maker. Lord Holt took the same view he had taken in Clerke *v.* Martin; but the pressure against him was very strong, and he now said that he desired to speak with two of the most famous merchants in London 'of the mighty ill consequences that was pretended would ensue' from adhering to his view of the subject. They told him plainly of the custom; 'and the court at last took the vacation to consider of it.' Pending the decision, the statute of Anne was passed, by which it was provided that 'notes in writing . . . to the intent to encourage trade and commerce, which

will be much advanced if such notes shall have the same effect as *inland* bills of exchange, . . . shall be assignable or indorsable over in the same manner as *inland* bills of exchange are or may be according to the custom of merchants.' That clearly shows that inland bills had taken their place in the general law of England before promissory notes. It is not improbable, however, that all of these instruments had been enforced, according to their tenor, under the custom of merchants in the 'Dusty-Foot' (Pie-poudre) courts of trade until in the 17th century, when those courts began to disappear. See Scrutton, Mercantile Law, chap. 1, 2.]

QUINBY *v.* MERRITT.

Supreme Court of Tennessee, December, 1850. 11 Humph. 439.

A written promise to pay a sum of money in carpenter's work cannot be a promissory note.

An undertaking to pay A or B is not according to the law merchant; but it is evidence of a contract to pay the persons named, jointly.

The case is stated in the opinion.

TOTTEN, J., for the court. — The action is founded on an obligation executed by defendant to Susan Quinby, on the 29th October, 1842, by which he agreed to pay to Susan Quinby one hundred and forty dollars in carpenter's work, and upon said obligation are the following indorsements, to wit: 'Pay the within to the order of C. W. or W. L. Nance,' signed 'Susan Quinby;' 'I assign the within to Wm. Warmouth, without recourse on me, Oct. 14, 1846,' signed 'C. W. Nance.'

HIS honor the judge instructed the jury 'that if the paper in suit was assigned to C. W. or W. L. Nance, the assignment of one of them would not transfer the paper; but if both had assigned it, the word "or" would be construed "and," to effectuate the intention of the party.' The verdict was of course for the defendant, and the only

question is, whether there was error in the instruction to the jury; and we are of the opinion that there was not.

As to the character of the instrument, we may observe that it is not a negotiable paper in the sense of the law merchant; though by statute (1801, ch. 6, § 54) such a contract is assignable so as to transfer the legal interest and to enable the assignee to sue in his own name. Whiteman *v.* Childress, 6 Humph. 309.

The case of Willoughby *v.* Willoughby, 5 N. H. 254, was an action by one of the payees on a note payable to Washington or Joseph Willoughby, and the court was of opinion that the note was evidence of a contract with both the payees jointly; that 'or' in the note must be understood to mean 'and;' and therefore that one of the payees could not maintain the suit without joining the other.

In Blanckenhagen *v.* Blundell, 2 Barn. & A., and Walrad *v.* Petrie, 4 Wend. 575, the notes were made payable to two persons in the disjunctive, and a similar view of the subject was taken. But these cases are principally to the point that such a note is not valid as a promissory note, because of the uncertainty of the person entitled to the payment; and certainly that is to be taken as the settled doctrine as to promissory notes, made negotiable, as under the law merchant. Story on Prom. Notes, § 33.

The case of Ellis *v.* McLemood, 1 Baily, S. C. 13, maintains a different rule, and decides that one of the payees of a note may alone maintain the action, because it is made payable to either. This case must be considered as standing opposed to the weight of authority on this subject, and we are by no means satisfied with the principle it holds or the reasoning employed to maintain it.[1]

Although such paper be not valid as a promissory note, yet it is evidence of a contract for the payment of money, and, according to the cases referred to, and especially that in 5 N. H., it is evidence with both the payees jointly;

[1] See Osgood *v.* Pearsons, 4 Gray, 455; Bills and Notes (Students' series), 14.

and they have therefore a joint interest in the fund secured by such note.

If this view of the subject be not correct, then the note or other contract so made payable to two or more in the disjunctive should be taken as void for uncertainty, as we do not see that any one of the payees can have a better claim than another to sue upon the note or contract, or demand its payment. It is true that a payment to any one of them would be a discharge of the contract; but that is also true when the note or contract is made payable to two or more persons jointly; a payment to one is a payment to all, although they have a joint interest in the fund.

We think it more conformable to reason as well as authority to hold such a contract as valid, and as conferring a joint interest on the persons with whom it is made, and who are entitled to its proceeds. Now to apply this principle to the present case, the assignment to 'C. W. or W. L. Nance' will be construed as conferring upon them not a separate but a joint interest in the contract, that being the intention as well as legal effect; and as only one of them has assigned to the plaintiff, it follows that the plaintiff is not invested with the legal title to the contract, and therefore cannot maintain an action upon it. It certainly was competent for him, as the owner of this obligation, to strike out the assignments, they being imperfect, and to sue in the name of the payee for his use; but as he relies upon the assignments, and they do not transfer the legal title, the present action cannot be maintained. Let the judgment be

Affirmed.

ADAMS *v.* KING.

Supreme Court of Illinois, December, 1854. 16 Ill. 169.

A promissory note may be payable to 'the administrators of A C, deceased.'

Demurrer to a declaration overruled.

Scates, J., for the court. — The error assigned is for overruling a demurrer to the declaration. It was in assumpsit, and contained two counts; each upon a promissory note made by plaintiffs in error to 'the administrators of Abner Chase, deceased,' for $400, with six per cent interest from date, for value received, dated 7th March, 1853, one payable in six and the other in twelve months. The declaration further avers that defendants were the administrators of Abner Chase on the 7th March, 1853, with profert of the letters of administration, dated 19th December, 1851, and that the notes were executed, delivered, and made payable to the defendants by the name and style of the 'administrators of Abner Chase, deceased.'

The objections taken are, that this is not a promissory note; that there is no payee, or that the payee is uncertain; or if there be a payee, it is a promise to defendants in their representative character, and they should sue as administrators.

We do not assent to either objection. The general rule in relation to bills of exchange and promissory notes requires that the person to whom they are made payable shall be specified. Chit. on Bills, 156. But this may be done without inserting the name; for that is certain which may be rendered certain; and if the payee be so certainly described or referred to as to be easily ascertained by allegations and proofs, the promise will be valid. The declaration avers that plaintiffs were 'administrators of Abner Chase, deceased' at the time these promises were made, and that they were made to them personally by that designa-

tion and description. These are traversable allegations, and must be denied under oath, by our statute, as settled in Frye *v.* Menkins, 15 Ill. 339. The same rule was applied in ascertaining the promisors in Dwight *v.* Newell, 15 Ill. 333. They have not sued as administrators, and it was therefore unnecessary to aver that they were administrators at the time this action was commenced. The demurrer admits the promise to be to defendants personally, by a descriptive phraseology.

The case referred to in Breese, 2, was ruled upon the ground that there was no payee, and that in Breese, 155, was upon the same ground. The case of Berry *v.* Hawly, 1 Scain. 468, was put upon the ground of a want of power, in a county treasurer, to take under such a promise.

The cases in 15 Ill. are decisive of this, in principle. The judgment must therefore be

Affirmed.

SPERRY *v.* HORR.

Supreme Court of Iowa, June, 1871. 32 Iowa, 184.

A stipulation for the payment of 'collection and attorney fees' added to a promissory note will not destroy the instrument as a promissory note.

Action as by indorsee against maker upon unstamped instruments by which the maker promised to pay A. S. Jones & Co., or bearer, a certain sum of money at a certain time, adding: 'If not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney fees therefor.' Defence, fraud, want of consideration, etc., and that the instruments were not stamped. It was also objected that the words quoted destroyed the negotiability of the promise. Judgment for plaintiff, without 'collection and attorney fees.' Appeal by defendant.

Beck, J., for the court. — The question raised by appellant relates to the sufficiency of the instruments sued upon

as promissory notes, and the defence pleaded that they were not stamped by defendant. If the instruments are non-negotiable, the facts found by the court are sufficient to defeat recovery in this action; if negotiable, the judgment of the District Court, so far as the defence of fraud, want of consideration, etc., are concerned, must be sustained. We are required therefore to determine whether the instruments are promissory notes. It is claimed that they are not for the payment of a *certain* sum of money; the agreement obligating the maker to pay collection and attorney fees, it is insisted, renders the amount payable uncertain, and thereby destroys their character as negotiable paper.

The rule that to constitute a negotiable promissory note there must be entire certainty and precision as to the amount of money to be paid is fully admitted, and understood to be inflexible. But in our opinion the instruments which are the foundation of this suit are, within the meaning of this rule, for the payment of a certain and precise sum, and are therefore to be considered promissory notes.

The sums payable by the terms of the notes are fixed and certain; they are subject to no increase or diminution. When they matured, no inquiry was necessary to be made as to facts not apparent in the face of the notes in order to fix the amount due; recovery could have been had upon the notes themselves without other evidence. The agreement for the payment of attorney fees in no sense increased the amount of money which was payable when the notes fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought, and such liability did not become absolute until an action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued, to enforce its collection, than to the sum which the maker

is bound to pay.[1] It is not different in its character from a cognovit, which when attached to promissory notes does not destroy their negotiability. In our opinion, therefore, the court was correct in holding that the instruments sued on are negotiable and not within the operation of the rule above stated. This conclusion is, we believe, supported by prior decisions of this court. Jewett *v.* Lyon, 3 Greene, 577; Knipper *v.* Chase, 7 Iowa, 147; Green *v.* Austin, id. 522.

Many authorities hold that an agreement incorporated in the body of a note, binding the maker to pay, in addition to the amount named, exchange thereon, does not under the rule just considered destroy the negotiable character of the instrument. Johnson *v.* Frisbie, 15 Mich. 286; Smith *v.* Kendall, 9 id. 241; Leggett *v.* Jones, 10 Wis. 35; Grutacap *v.* Woullouise, 2 McLean, 581.

Under the principles of these decisions there is no difficulty in holding the paper in question to be negotiable. The exchange provided for by the notes in these cases may be considered, however, as part of the sum due, the amount to be paid. But in the case at bar, as we have seen, the attorney's fees are not part of the sums due on the notes, but an amount for which the maker may become liable when a legal remedy is enforced against him. There are other cases, probably equal in number and authority to those last cited, holding a contrary doctrine. See 1 Parsons on Bills and Notes, 38; Lowe *v.* Bliss, 24 Ill. 168; Read *v.* McNulty, 12 Rich. (Law), 445. Without weighing these conflicting authorities, we are of the opinion that the judgment of the District Court ought to be affirmed upon the ground first stated. . . . [A point about stamping.]

[1] This may be doubted, without impeaching the soundness of the rest of the reasoning.

MATTISON *v.* MARKS.

Supreme Court of Michigan, April, 1875. 31 Mich. 421.

A promissory note may be made payable 'on or before' a day named.

Suit on a written promise to pay a sum of money 'on or before' a day named.

COOLEY, J., for the court. — . . . [A question of payment here considered, the ruling of the lower court being held erroneous].

This view will dispose of the case, unless the defendant is correct in the position he takes, that the paper sued upon is not a promissory note. If it is not, the suit must fail, because the declaration has treated it as such, and is not adapted to the case of any other special contract. The objection to this instrument is, that it promises to pay a certain sum of money 'on or before' a day named; and this, it is said, is not a promise to pay on a day certain, and consequently cannot be a promissory note. We are referred to Hubbard *v.* Mosely, 11 Gray, 170, in support of this view. That case certainly seems to support the position of defendant, and it is to be regretted perhaps that the learned judge who delivered the opinion did not deem it important to present more fully the reasons that led him to his conclusions, instead of contenting himself with a simple reference to the general doctrine that a promissory note must be payable at a time certain. It seems to us that this note is payable at a time certain. It is payable certainly, and at all events, on a day particularly named; and at that time, and not before, payment might be enforced against the maker. It is impossible to say that this paper makes the payment subject to any contingency or puts it upon any condition. The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. True, the maker may pay sooner if he shall choose; but this option, if exercised,

would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings. It ought not to be questioned for the sake of any distinction that does not rest upon sound reason, and we can discover no sound reason for the distinction here insisted upon.

The judgment must be *Reversed.*

But see Stults *v.* Silva, 119 Mass. 137, cited with other cases in Bills and Notes (Students' series), 18, 24.

WORDEN *v.* DODGE.

Supreme Court of New York, January, 1847. 4 Denio, 159.

An instrument by which a party promises to pay a certain sum at a stated time out of the net proceeds of ore to be raised and sold from a certain ore bed, is not a promissory note.

Assumpsit upon a written instrument in the form of a promissory note, except that it was payable 'out of the net proceeds after paying the costs and expenses of ore to be raised and sold from the bed in the lot this day conveyed by Edward Malden to Edwin Dodge, which bed is to be opened, and the ore disposed of as soon as conveniently may be.' The plaintiff, who was the payee, was nonsuited, because he offered no evidence that sufficient ore had been obtained from the mine or that the defendants had been negligent in the matter Motion for a new trial.

Beardsley, J., for the court. — The nonsuit was proper. A promissory note must be payable absolutely, and not upon any contingency as to time or event. 3 Kent, 5th ed. p. 74; Smith on Merc. Law, 113, 116; Story on

Prom. Notes, §§ 1, 22–26; id. on Bills of Exch. §§ 46, 47; Chit. on Bills, 10th Am. ed. pp. 132–139.

This was not such an engagement, for although the promise was to make payments at certain specified times, the payments were to be made 'out of the net proceeds' 'of ore to be raised and sold' from a certain ore bed. Here was a contingency; the fund might turn out to be inadequate, in which case there would be no obligation to pay at any time. It was not a promise to pay 'absolutely and at all events,' as a promissory note always is.

New trial denied.

KELLEY *v.* HEMMINGWAY.

Supreme Court of Illinois, June, 1852. 13 Ill. 604.

A writing promising to pay a certain sum when A shall arrive at age is not a promissory note; and it does not alter the case that A actually lives to attain his majority.

The case is stated in the opinion of the court.

Treat, C. J., for the court. — This was an action brought by Hemmingway against Kelley before a justice of the peace, and taken by appeal to the Circuit Court. On the trial in the latter court, the plaintiff offered in evidence an instrument in these words: —

'Castleton, April 27, 1844.

'Due Henry D. Kelley, fifty-three dollars when he is twenty-one years old, with interest. David Kelley.'

On the back of which was this indorsement: —

'Rockton, May 21, 1849.

'Signed the within, payable to Moses Hemmingway.
Henry Kelley.'

The plaintiff proved that the payee became of age in August, 1849. The defendant objected to the introduction

of the instrument, because it was not negotiable, but the court admitted it in evidence, and rendered judgment for the plaintiff.

Our statute makes promissory notes assignable by indorsement in writing, so as absolutely to vest the legal interest in the assignee. Was the instrument in question a promissory note? To constitute a promissory note, the money must be certainly payable, not dependent on any contingency, either as to event, or the fund out of which payment is to be made, or the parties by or to whom payment is to be made. If the terms of an instrument leave it uncertain whether the money will ever become payable, it cannot be considered as a promissory note. Chit. on Bills, 134. Thus, a promise in writing to pay a sum of money when a particular person shall be married, is not a promissory note, because it is not certain that he will ever be married. Pearson *v.* Garret, 4 Mod. 242; Beardsley *v.* Baldwin, 2 Strange, 1151. So of a promise to pay when a particular ship shall return from sea, for it is not certain that she will ever return. Palmer *v.* Pratt, 2 Bing. 185; Coolidge *v.* Ruggles, 15 Mass. 387. In all such cases, the promise is to pay on a contingency that may never happen. But if the event on which the money is to become payable must inevitably take place, it is a matter of no importance how long the payment may be suspended A promise to pay a sum of money on the death of a particular individual is a good promissory note, for the event on which the payment is made to depend will certainly transpire. Colehan *v.* Cooke, Willes, 393; s. c. 2 Strange, 1217.

In this case, the payment was to be made when the payee should attain his majority, — an event that might or might not take place. The contingency might never happen, and therefore the money was not certainly and at all events payable. The instrument lacked one of the essential ingredients of a promissory note, and consequently was not negotiable under the statute. The fact that the payee

lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter ex post facto. The plaintiff has not the legal title to the instrument. If it presents a cause of action against the maker, the suit must be brought in the name of the payee. The case of Goss *v.* Nelson, 1 Burr. 226, is clearly distinguishable from the present. There the note was made payable to an infant when he should arrive at age, and the day when that was to be was specified. The court held the instrument to be a good promissory note, but expressly on the ground that the money was at all events payable on the day named, whether the payee should live till that time or die in the interim; and it was distinctly intimated that the case would be very different had the day not been stated in the note. It was regarded as an absolute promise to pay on the day specified, and no effect was given to the words that the payee would then become of age.

The judgment must be *Reversed.*

HASKELL *v.* LAMBERT.

Supreme Court of Massachusetts, November, 1860. 16 Gray, 592.

A provision following the language of a promissory note, that the instrument is 'to be held as collateral security for the payment' of other obligations, destroys the instrument as a promissory note.

Contract by the plaintiff as indorsee against the defendant as second indorser of the following instrument: —

'Boston, January 4th, 1850. Six months after date I promise to pay to the order of myself twenty-four hundred dollars, value received, to be held as collateral security for the payment of E. Boynton's note, December 5th, 6 months for $968.41; P. E. Webster's note, September 7th, 6 months for $257.72, and his acceptance, December 11th,

6 months for $178.10; M. Bartlett & Co's note, May 7th, 6 months for $435.40; Wm. M. Jackson's note, November 5th, 6 months for $562.59. George Lambert.'

No objection was made in the answer to the form of the note; but at the trial in the Superior Court of Suffolk at May term, 1859, Morton, J., ruled that if all the facts necessary to make out his case were proved, the plaintiff could not maintain this action, because the instrument declared on was not a negotiable promissory note. Verdict for the defendant; the plaintiff alleged exceptions.

Bigelow, C. J., for the court. — The contract declared on is in legal effect a promise to pay a sum of money in six months after its date if certain debts enumerated in it are not paid by the persons liable therefor. It is therefore not an absolute promise to pay money at all events, but only upon a contingency. Nor is it certain as to the sum which will be payable at its maturity. Being given as collateral security for certain specified debts, for which different persons are liable, the payment of any portion of such debts will reduce the amount pro tanto for which the defendant can be held upon his promise. It is therefore an agreement to pay the whole sum in a certain contingency, or such part thereof as may not be paid by certain other persons. In these particulars it lacks the essential qualities of a promissory note. It is a contingent promise, and the sum which will be due upon it at the expiration of six months is uncertain. A promise to pay money, not certain as to amount, and contingent upon a future event, is not regarded as negotiable, because it carries with it on its face notice of the contingency or uncertainty, and the holder or assignee must be bound by the stipulation, and must take it subject to all the equities. Although he may have paid full value for it, he cannot enforce it except on the prescribed contingency or for the amount which may at its maturity turn out to be due. Besides, it would essentially infringe on an estab-

lished and salutary rule of law to hold a conditional or contingent promise to pay money valid, without requiring proof of consideration. The case at bar is very similar to Robins *v.* May, 11 Ad. & El. 213, and 3 P. & Dav. 147. See also Byles on Bills (6th ed.), 71; Cota *v.* Buck, 7 Met. 589.

The contract not being negotiable, and there being no proof of any express promise by the defendant to pay to the plaintiff the amount of the note or any part of it, it is clear that the present action cannot be maintained, and that no amendment of the declaration can be made under which the plaintiff would be entitled to recover.

Exceptions overruled.

WORKS *v.* HERSHEY.

Supreme Court of Iowa, December, 1872. 35 Iowa, 340.

A promise to pay a certain sum of money 'on demand after date . . . when convenient' is a promissory note.

On demurrer to answer.

Beck, C. J., for the court. — The promissory note which is the foundation of this action is in these words:

'Cincinnati, Feb. 6, 1864.

'$2,512.84.

'On demand after date I promise to pay to the order of Niles Works twenty-five hundred and twelve $\frac{84}{100}$ dollars, payable at Cincinnati when convenient. B. Hershey.'

. . . . . .

So far as the answer relies upon the peculiar phraseology of the note sued on, it was subject to the demurrer. The words 'payable at Cincinnati when convenient' cannot be construed to nullify the other words of the instrument, viz. '*on demand* I promise to pay.' If any force be given to them it will be that the maker bound

himself to pay within a reasonable time after the date of the note. Ramot *v.* Schotenfels, 15 Iowa, 457. There is no claim in the answer that a reasonable time had not been given defendant, after the execution of the note, for its payment.

. . . . . .

TAYLOR *v.* DOBBINS.

King's Bench of England, Pasch. 6 Geo. I. 1 Strange, 399.

Signature of a promissory need not be at the end.

In case upon a promissory note the declaration ran, that the defendant made a note 'et manu sua propria scripsit.' Exception was taken that since the statute [of Anne] he should have said that the defendant signed the note; but the court held it well enough, because alleged to be wrote with his own hand, and there needs no subscription in that case, for it is sufficient his name is in any part of it. 'I, J S, promise to pay,' is as good as 'I promise to pay,' subscribed 'J S.'

In Elliot *v.* Cowper, 1 Strange, 609, it was held that the words 'fecit [the defendant] quandam notam in scriptis per quam promisit solvere,' imported that the note was signed or written by the defendant.

SHOE & LEATHER NATIONAL BANK *v.* DIX.

Supreme Court of Massachusetts, September, 1877. 123 Mass. 148.

Exempting oneself from personal liability, in terms, on the face of a promise to pay in a particular character, is valid.

Contract. The defendants made the following promissory note, which was indorsed by the payees to the plaintiff: —

'February 16, 1871, $53,000. For value received, we as trustees but not individually promise to pay to the Boston Water Power Company or order the sum of fifty-three

thousand dollars in five years from this date, with interest to be paid semi-annually, at the rate of seven per centum per annum, during said term, and for such further time as said principal sum or any part thereof shall remain unpaid.

'Signed in presence of P. H. SEARS.

GEORGE P. SANGER,
JOSEPH DIX,
R. A. BALLOU,
} *Trustees.*'

'Secured by mortgage of real estate in Boston,' by the defendants.

The question, raised on agreed facts which need not be stated here, was whether this promissory note bound the makers personally.

AMES, J., for the court. — The question whether the defendants have made themselves personally responsible must be determined by the terms of the note itself. In determining the proper interpretation of any written contract the court will give full effect to all the terms in which it is expressed. Those terms will not be modified by extrinsic evidence tending to show that the real intention of the parties was something different from what the language imports. They will be taken in their plain, ordinary, and popular sense, except where it may be qualified by some special usage, or where the context evidently shows that the parties in some particular case had a different intent. It is no part of the business of the court to make or alter a contract for the parties. Even if it be found that the contract, according to its true meaning, has no legal validity, or fails to become operative, it is not for the court, in order to give it operation, to suppose a meaning which the parties have not expressed, and which it is certain they did not entertain. It must be assumed that all the language used in the contract was selected with some purpose and is to be of some effect. If a party, therefore, in a contract into which he voluntarily enters, and not in the execution of any official trust or duty,

makes it an express stipulation that he is acting for somebody else, and is in no event to be personally liable, he certainly cannot be rendered so by law. Sedgwick, J., in Sumner *v.* Williams, 8 Mass. 162, 184. In a question as to the meaning of a contract the want of apt words to create a personal liability is not to be supplied by the alteration or enlargement of its terms.

In applying these familiar and elementary rules of construction to the case now before us we find that the defendants promised 'as trustees but not individually.' The construction contended for by the plaintiffs would require us to strike out the words 'but not individually;' although in so doing we should not only alter the contract, but should impose upon them a liability which apparently they took special pains to avoid.

It is to be borne in mind that this was not a case of agents acting for an undisclosed or unknown principal, and is therefore readily distinguishable from Winsor *v.* Griggs, 5 Cush. 210, and cases of that class. Neither was it an attempt by the defendants to bind property over which they had no legal control. By the terms of the deed they had power to mortgage, lease, and manage the property at their discretion, but for the benefit and on the account of the equitable owners, namely, the members of the Brookline Avenue Association. In this respect the case differs from Thacher *v.* Dinsmore, 5 Mass. 299, Foster *v.* Fuller, 6 Mass. 58, and other cases of that class, in which a party promising 'as guardian,' etc., was held to have made himself personally liable.

Neither can it be said that the term 'trustees' was used as 'a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency.' In this respect the case differs from Tucker Manuf. Co. *v.* Fairbanks, 98 Mass. 101. It often has happened that an agent for another person, or the treas-

urer of a corporation, has made himself personally responsible by the form of words in which he has expressed himself in a written contract, when he may have intended to bind his principal only. Cases in which this question has been raised have often been before this and other courts, and the authorities have recently been collected and reviewed in several of our own decisions. See Slawson *v.* Loring, 5 Allen, 340; Barlow *v.* Lee Congregational Society, 8 Allen, 460; Tucker Manuf. Co. *v.* Fairbanks, ubi supra. But we believe no case can be found in which a promise 'as trustee,' etc., accompanied with an express disclaimer of personal liability, would fail to exempt him.

It is contended that if these defendants are not liable upon the contract as a note, then nobody is liable. Even if such were the fact, it would not be in the power of the court, as we have already seen, to alter the contract for the purpose of giving it validity. In deciding whether the defendants have or have not bound themselves we need not decide whether they have or have not bound their principals. Abbey *v.* Chase, 6 Cush. 54. But even if the written contract should fail of taking effect as a negotiable note, it might still be operative as an acknowledgment of unpaid debt, which the mortgage was intended to secure. It may be that this was all that the original parties intended or supposed to be material. They may have considered the mortgage sufficient security, without the personal responsibility of the trustees.

Our conclusion, therefore, is that without proof that the defendants, as trustees, have funds of the association in their hands applicable to this debt, no actions can be maintained against them. No evidence to that effect having been offered, we must order

Judgment for the defendants.

SEABURY *v.* HUNGERFORD.

Supreme Court of New York, October, 1841. 2 Hill, 80.

Indorsement of a promissory note, by a third person, to secure the payee, makes such party liable as indorser only.

Assumpsit. The plaintiff gave in evidence a promissory note as follows: 'Knox, March 30, 1837. Six months after date, for value received, we jointly and severally promise to pay Daniel Seabury, or bearer, the sum of one hundred and twenty-five dollars, with interest from date. Justus Pickering.' On the back was the defendant's name, 'John I. Hungerford, backer, Schoharie.' On this evidence the plaintiff claimed to recover. The judge decided that the defendant was to be regarded as an *indorser* of the note, and that the plaintiff must show a demand, and notice of non-payment; that the defendant could not be charged as maker or guarantor without showing that he was privy to the consideration of the note. The plaintiff excepted. A witness for the plaintiff testified that he heard the defendant say that if it had not been for getting his own pay from Pickering, the maker, he, Hungerford, would not have signed the note. This conversation was near where the defendant lived in Schoharie, in October, 1837. The witness went with the plaintiff to demand and get the money on the note. The defendant first said to the plaintiff, 'You are too late; you should have come on the 15th of September;' but after looking at the note he said, 'You are right.' The plaintiff said he had seen Pickering the day before, and could not get the money from him except $18, which he then paid. There was no proof of a demand and notice at the proper time to charge the defendant as indorser. The judge decided that this evidence was not sufficient to charge the defendant on the ground of his being privy to the consideration of the note; and that the fact that the defendant put his name on the note to enable Pickering to procure the money from the

plaintiff did not alter the case — the defendant was an indorser, and entitled to require demand and notice. The plaintiff excepted, and the jury found a verdict for the defendant. The plaintiff now moved for a new trial, on a bill of exceptions.

Bronson, J., for the court. — Although the nature of the obligation which the defendant intended to contract was sufficiently manifested by putting his name on the back of the note, he seems to have added the word 'backer' for the purpose of declaring still more explicitly that he was to be regarded as an indorser; and his residence was given for the purpose of indicating the place to which notice might be sent in case the note should not be paid at maturity by the maker. I infer also from the conversation between the parties about the time the note fell due, that they both regarded the defendant as standing in the character of an indorser and entitled to notice as such. I do not see therefore upon what principle he can be charged as maker or guarantor. It would be substituting a new contract for the one which the parties have made.

If the special circumstances which have been mentioned are laid out of view, the result will still be the same. When a man writes his name, without anything more, on the back of a negotiable promissory note, he agrees that he will pay the note to the holder on receiving due notice that the maker, on demand made at the proper time, has neglected to pay it. This is the legal effect of the indorsement, and the case is not open to any intendment, — certainly not to the presumption that the party meant to contract a different obligation. Proof that he put his name on the note for the purpose of giving credit to the maker, or enabling him to raise money upon the paper, only shows that there is a special relation between him and the maker, not between him and the holder. It does not change the nature of the contract of indorsement from what it would be had the note actually passed through his

hands in the usual course of business and been indorsed for value. If this be not so, then every accommodation indorser may be treated as a maker or guarantor of the paper.

Now, what did the plaintiff prove for the purpose of obviating the objection that there had been no demand and notice? The defendant said, about the time the note fell due, that if it had not been for getting his own pay from Pickering, the maker, he would not have signed the note. This does not prove that there was originally any agreement or understanding between the plaintiff and the defendant aside from the contract of indorsement, or that they had any communication whatever in relation to the giving or indorsing of the note. The most that can be justly inferred from the admission is, that the defendant indorsed for the accommodation of Pickering, and that his motive for doing so was the expectation of getting a debt which Pickering owed him. But neither the fact of his being an accommodation indorser, nor his motive for becoming such, can affect the present question. The plaintiff had nothing to do with the mode in which Pickering should dispose of the money to be obtained on the note; and whether the defendant did an act of mere benevolence, or whether he expected to derive some personal advantage from the indorsement, cannot alter the nature of his contract.

If we assume that the note was originally passed to the plaintiff, who is named in it as payee, that will not alter the case. The defendant might still have been charged as indorser; and where he may be so charged, he cannot, I think, be made liable in any other form. The note is payable to the plaintiff *or bearer*, and in its legal effect was payable to the bearer. The plaintiff might have declared that Pickering made his promissory note payable to bearer, and delivered it to the defendant, who thereupon indorsed and delivered it to the plaintiff, with an averment that payment was demanded of the maker at maturity,

and due notice of non-payment given to the defendant. The plaintiff might also have transferred the note by delivery to some third person, and then the holder might have declared in the same way; or he could have alleged that Pickering made his note payable to Daniel Seabury or bearer, that Seabury delivered it to the defendant, who indorsed and delivered it to the holder. But without transferring the note, if the plaintiff had taken the proper steps for that purpose there could be no difficulty in his declaring and recovering against the defendant as indorser. We had occasion to consider this question in Dean *v.* Hall, 17 Wendell, 214, and that case will be found to be entirely decisive of the one at bar. Coleman made his promissory note payable to Howard or bearer, upon the back of which Hall indorsed his name, and the note was then delivered to Howard, the payee named in it. We held that there was no legal difference between a note payable to bearer and one payable to a particular person or bearer; that Howard, the payee, or Dean, to whom he had transferred the note, might either of them have declared and recovered against Hall as indorser; and that they could not charge him in any other character.

If the note had not been negotiable, or if for any other reason the case had been such that the defendant could not, by the exercise of proper diligence, have been charged as indorser, and there had been an agreement that he would answer in some other form, then the plaintiff might have written over the name such a contract as would carry into effect the intention of the parties. When a contract cannot be enforced in the particular mode contemplated by the parties, the courts, rather than suffer the agreement to fail altogether, will, if possible, give effect to it in some other way. But they never make contracts for parties, nor substitute one contract for another. This was, in legal effect, regular mercantile paper, upon which the defendant contracted the obligation of an indorser within the law merchant; and by that obligation, and no other, he is bound.

It is said that the defendant was privy to the consideration for which the note was given, and therefore liable as maker or guarantor. But it is not enough that the indorser knows what use is to be made of the note, or that he indorses for the purpose of giving the maker credit, either generally or with a particular individual. If the note is negotiable, the only inference to be drawn from the fact of his putting his name on the back of it is, that he intended to give the maker credit by becoming answerable as *indorser;* and this inference is so strong that it will prevail even where his obligation as indorser cannot be made operative without first obtaining the name of another person to the paper. Herrick *v.* Carman, 12 Johns. 159; Tillman *v.* Wheeler, 17 id. 326. Before he can be made liable as maker or guarantor, there must at the least be an agreement that he will answer as such. Nelson *v.* Dubois, 13 Johns. 175. And where a parol agreement to that effect is shown, I do not see how it can be made to take the place of the written contract of indorsement. In other cases the rule is, that when parties have come to a written contract, that is taken as the evidence of their final agreement, and all prior negotiations are merged in it. In Nelson *v.* Dubois the defendant agreed to become *security* for Brundige, and to *guaranty* the payment of a note which B. was about to make to the plaintiff; but when the contract came to be reduced to writing, it took the form of a negotiable promissory note upon which the defendant might have been charged as indorser. That was the final agreement between the parties, and I see no principle upon which the plaintiff could be allowed to abandon the written contract and go back to the prior negotiations for the purpose of charging the defendant as *guarantor.* And although the defendant was charged in that form, the case is not, I think, an authority for the position which it is usually cited to support. The point that the defendant might have been made answerable as indorser was neither taken at the trial nor on the argument, nor was it

mentioned by the court; but the contrary was assumed in every stage of the cause. The only objection made at the trial or on the argument was, that the case fell within the influence of the Statute of Frauds. It was assumed that the defendant could only be charged as guarantor, and the objection was that the contract of guaranty should have been written out at the time the defendant put his name on the note. Spencer, J., who delivered the opinion of the court, stated at the outset that the case turned on the point whether the promise was within the Statute of Frauds. He then proceeded to cite cases where the party had been held answerable as guarantor, although the contract had not been written out in full at the time; but they are all cases where he could not have been charged as indorser. Nelson *v.* Dubois is then an authority for the position that one who puts his name in blank on the back of a promissory note may be held liable as maker or guarantor when there is an agreement to that effect, and when he could not be charged as indorser: the case is not within the Statute of Frauds. But it is not an authority for saying that the usual contract of indorsement upon commercial paper can be changed into something else by showing a prior parol agreement to be answerable in some other form. This court could never have intended to sanction the doctrine that the holder of a negotiable promissory note may abandon the contract in writing actually made by the indorser and substitute another contract in its place.

In any view of the case of Nelson *v.* Dubois it proves nothing against this defendant, for here there was not only a regular contract of indorsement, but there is not a particle of evidence, by parol or otherwise, that the defendant ever made any different agreement. It is impossible to charge him as maker or guarantor. The cases on this subject were so fully considered in Dean *v.* Hall, 17 Wendell, 214, that I do not think it necessary to examine them on the present occasion.

Nelson, C. J., dissented. *New trial denied.*

SYLVESTER *v.* DOWNER.

Supreme Court of Vermont, March, 1848. 20 Vt. 355.

Indorsement of a promissory note, by a third person, to secure the payee, makes such party liable presumptively as a maker of the note; but evidence is proper to show what the understanding in fact was when the party so signed.

Assumpsit. The plaintiff declared against the defendant as maker of a promissory note payable to Austin & Fay, or order, and by them indorsed to the plaintiff's testator. There was a count also for money had and received. Plea, the general issue.

The plaintiff offered in evidence a promissory note for $75.00, payable to Austin & Fay, or order, with the following indorsements: 'For value received pay the contents to Lemuel Sylvester. Austin & Fay.' 'For value received I promise to pay this note according to its tenor to Lemuel Sylvester. Solomon Downer.' To this evidence the defendant objected, for variance; but the objection was overruled. The indorsements were made in blank, and were filled up by the plaintiff before trial.

The plaintiff produced evidence that Austin & Fay were indebted to Lemuel Sylvester, and that the defendant had agreed to pay the debt, and was then the owner of the note in suit; that the defendant then proposed to Lemuel Sylvester that he would let him have the note in part payment of that debt, and that he, the defendant, 'would make it good to him by putting his name upon the back of it, and Austin & Fay should do the same;' that each of the partners of said firm was then sitting at the same table with the defendant and Lemuel Sylvester, and that Lemuel then agreed to receive the note, as the defendant offered, and that the defendant wrote his name upon the back of the note and then delivered it to Austin, and that he wrote upon it the name of the firm, and that the note was then delivered to and received by Lemuel Sylvester in part

payment of said debt. There was no other evidence in the case.

The court charged the jury that if they found the facts as testified, and considered from the evidence that the defendant intended, by what he said at the time of transferring the note to Lemuel Sylvester, to assume an absolute and unconditional undertaking to pay the note or see it paid, according to its tenor, they should return a verdict for the plaintiff. Verdict for plaintiff. Exceptions by defendant.

REDFIELD, J., for the court. — This is an action in common form against the defendant as a sole maker of a promissory note. The note, on being produced, showed his name indorsed upon it, and also that of the payees of the note. This, according to the decisions of this court, repeatedly made, imposed upon the defendant the obligation of the maker of the note, with this difference only, that, his undertaking being in blank, as between the parties to it, it was susceptible of being controlled by oral evidence of the real obligation intended to be assumed at the time of signing. This has been so often declared by this court that it seems needless to refer to the decisions. But I will advert to some of them with a view to extract from them the principle of the decisions.

The first case which distinctly assumed this ground is that of Knapp *v.* Parker, 6 Vt. 642. In that case the note had been due before it was indorsed by the defendant, and he was sued as maker and the suit sustained. It is true the court, in their opinion, advert to a prior contract resting in parol merely; but this was clearly merged in the writing. It was of no importance in determining the prima facie legal obligation resulting from the *signature*. The *law* determines that; and the oral evidence was important only as tending to show that the defendant intended to assume just such an obligation as he did by the blank signature. . . . [Reviewing Flint *v.* Day, 9 Vt. 345,

Sanford v. Norton, 14 Vt. 228, and Strong v. Riker, 16 Vt. 554].

But what this court has repeatedly held upon this subject is, that he who writes his name upon the back of a note, if he were not before a party to it, assumes the same obligation as if he wrote his name upon the face of the instrument; and that, although he do this long after the making of the note, it shall make no difference. If he consent to be thus bound, and induce others to take the note under that expectation, he shall be estopped to deny that fact, and is treated to all intents the same precisely as if he had signed the note in its inception. But the signature being blank, he may undoubtedly show that he was not understood to assume any such obligation.

But the proof in the present case tended to show, and the jury have so found, that the defendant did intend to assume an unconditional obligation to pay the note, according to its tenor. This puts at rest all pretence that the defendant was not understood to assume the common obligation which his signature imported. This was that of the maker of a note to Austin & Fay, as that was the form of the note at the time he indorsed it; and had they refused to indorse it, the defendant might have been sued as maker, in their names, according to the case of Strong v. Riker, 16 Vt. 554. But they did indorse it. He was then liable as maker, to any person who might become a holder of the note, and especially to the plaintiff's testator, for he assumed the obligation with the understanding that the note was going immediately into his hands, and that the defendant was liable to him. This point is fully decided by Sanford v. Norton, 14 Vt. 228. The declaration in this case then was precisely according to the proof, — that the defendant made a note to Austin & Fay, which was indorsed to the plaintiff's testator. . . . [Competency of a witness.]

The fact that the defendant's indorsement was filled up differently from the declaration, and differently from the

import of his undertaking, is of no importance, as that is mere form, and may be made at any time, and if made wrong may be corrected at any time. It is just as well if it be not made at all.

Judgment affirmed.

UNION BANK OF WEYMOUTH AND BRAINTREE *v.* WILLIS.

Supreme Court of Massachusetts, October, 1844. 8 Met. 504.

If a person not a party to a note place his name upon the back of it at the time it was made, he is liable as maker; and, when the note is in the hands of a bona fide holder, the presumption in the absence of proof is that the name was placed upon it at the time it was executed.

Assumpsit by the indorsees against the indorser of a promissory note of the following tenor: 'August 8, 1843. For value received, I promise Tilley Willis to pay him, or order, $350, in four months from date. T. D. Thompson.' On the back was the name of B. L. Mirick & Co., and under that name was the name of the defendant, both indorsements being in blank.

At the trial before the Chief Justice, the plaintiffs' cashier testified that they discounted the note for Thompson, and that, when it was discounted, the names stood on the note as they now do. There was no evidence that the note was presented to Mirick & Co. for payment; but there was evidence tending to show that notice of dishonor was given to them, as indorsers, as well as to the defendant.

The defendant contended that Mirick & Co. were to be considered as joint, or joint and several, promisors, and that the defendant was not responsible as indorser, without proof of presentment to them for payment. But it was ruled that they were not to be so considered as promisors, as that presentment of the note to them, and demand of payment of them, were necessary to charge the defendant. A verdict was returned for the plaintiffs, which is to

be set aside, and a new trial granted, if the ruling was incorrect.

HUBBARD, J., for the court. — It is admitted that the note was not presented for payment to Mirick & Co.; and the question is, whether the omission to do it discharges the indorser.

If the subject now brought before us were a new one, we should hesitate in giving countenance to such an irregularity as to hold that any person whose name is written on the back of a note should be chargeable as a promisor. We should say that a name written on the paper, which name was not that of the payee, nor following his name on his having indorsed it, was either of no validity to bind such individual, because the contract intended to be entered into, if any, was incomplete or within the Statute of Frauds; or that he should be treated, by third parties, simply as a second indorser; leaving the payee and himself to settle their respective liabilities, according to their own agreement. But the validity of such contracts has been so long established, and the course of decisions, on the whole, so uniform, that we have now only to apply the law, as it has been previously settled, in order to decide the present suit.

The first case of this description, of which any mention is made in the reports, is that of Sumner *v.* Parsons, tried before this court in Lincoln County, July Term, 1801. The facts were these: 'Parsons wrote his name on a paper and gave it to John Brown, but there was no evidence of the intent, or of any connection in business between them. Brown made a note, on the other side, payable to Jesse Sumner or order, on demand, with interest, and signed it, and thirty days after made a partial payment on it. Sumner then got a writing in these words over the name of Parsons: "In consideration of the subsisting connection between me and my son-in-law, John Brown, I promise and engage to guaranty the payment of the con-

tents of the within note, on demand." And he sued Parsons, declaring on the promise, specially stating it and the note, but did not aver any demand on John Brown, or notice to Parsons. In two trials in the Supreme Judicial Court, it was held that Parsons was liable, and that Sumner had a right to fill the indorsement so as to make Parsons a common indorser of the note, with the rights and obligations of such, or a guarantor, warrantor, or surety, liable in the first instance, and, in all events, as a joint and several promisor would be.' Am. Prec. Declarations, 113. Mr. Dane, who cites it in his Abridgment, Vol. I. 416, 417, remarks that 'this case was carried as far as any case had gone, and on the review the court was not unanimous; and it has since been questioned;' and we have no doubt with good reason; for the holder of the paper, having himself set out the contract by the words written over the name of the defendant, should have been held by its terms, and the legal effect should have been given to the material word 'guaranty.' And, in that view of the contract, the promise of Parsons was only to pay after a demand upon Brown for payment and a refusal by him, and of which Parsons should have had notice. But the court must have construed the writing as constituting him an original promisor, and so bound, absolutely, without notice. And, in our apprehension, the writing of the guaranty over the name of Parsons ought not to have been held as an act obligatory on him; but he should have been treated, if held at all, as an indorser of the note, and, as such, subject to the liabilities, and entitled to the notice, of an indorser. See Beckwith *v.* Angell, 6 Conn. 325, opinion of Hosmer, C. J.

The next case which came before the court was that of Josselyn *v.* Ames, 3 Mass. 274. By the report, it appears that John Ames was indebted on note to the plaintiff, who demanded security, and John offered his brother Oliver as surety, who was accepted. John then made a note to Oliver, not negotiable, and Oliver put his name on the back in blank. The plaintiff received it and gave up his former

note, and afterwards wrote over the defendant's name the same words as in Sumner *v.* Parsons, with this additional clause: 'and in consideration of receiving from Elisha Josselyn a note of the said John of the same amount.' The court held that the plaintiff could not recover in that action, but might cancel the words written, and substitute, 'for value received, I undertake to pay the money within mentioned to Elisha Josselyn,' and, upon such an indorsement, might maintain an action upon the facts reported.

In what light the court held the defendant does not distinctly appear; but we presume as an original promisor, from the manner in which the case of Sumner *v.* Parsons is spoken of. 'The guarantor in that case,' they say, 'was not the promisee, but a stranger, who warranted the payment to him. He cannot himself warrant to a third person payment of a note made payable to himself and not negotiable.'

The next reported case is that of Hunt *v.* Adams, 5 Mass. 358, which was assumpsit on a note given by Chaplin to Bennet, under which the defendant wrote, 'I acknowledge myself holden as surety for the payment of the demand of the above note. Witness my hand. Barnabas Adams.' This cause was much considered, and the court ruled that the defendant, Adams, was to be charged as a promisor, and that his holding himself as surety did not abridge or affect the plaintiff's rights, but only was evidence, as between the promisor and himself, that he had signed for his accommodation. Other cases between the same parties, on similar notes, afterwards arose, and were decided in the same manner. 6 Mass. 519.

Immediately after, occurred the case of Carver *v.* Warren, 5 Mass. 545. That was on a note made by one Cobb to the plaintiff, and on the back of which the defendant wrote his name; and the plaintiff filled the indorsement, and declared upon it as his promise. The defendant demurred to the declaration, on the ground that this was but a promise to pay the debt of another, and was void for want of consideration. But the court held that, by the

pleadings, each promised to pay the same sum, and that the defendant's promise did not import any guaranty or collateral stipulation; and that if the defendant had indorsed as guarantor, and the present indorsement was filled up without his consent, or any authority from him, he should have pleaded the general issue, and on the trial he might have availed himself of this defence. And so the plaintiff had judgment on the demurrer.

The case of Hemmenway *v.* Stone, 7 Mass. 58, followed. There the note ran, 'I promise to pay F. M. Stone or order,' and was signed B. Chadwick; and below was signed by the defendant. The court held that it was a joint and several note, like the case of March *v.* Ward, Peake's Cas. 130. See also Bayley, Bills, 2d Am. ed., 44.

The next case was White *v.* Howland, 9 Mass. 314, which was on a note payable by one Taber to the plaintiff, and on the back of it was written, 'for value received, we jointly and severally undertake to pay the money within mentioned to the said William White. I. Coggeshall, Jr. Jno. H. Howland.' The court held that this undertaking was within the principle settled in Hunt *v.* Adams, and was the same as if the party had signed his name on the face of it; and that he was well charged as a several original promisor.

The case of Moies *v.* Bird, 11 Mass. 436, which succeeded, is substantially like the present. A note was made to the plaintiff, and signed by Benjamin Bird, and the defendant signed his name in blank on the back of the note. The court say, the defendant 'leaves it to the holder of the note to write anything over his name which might be considered not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety, binding himself originally with the principal; and we think he has a right so to do. If he was a surety, then he may be sued as an original promisor.'

In the case of Baker *v.* Briggs, 8 Pick. 130, which was an action to recover the amount of a promissory note made

by one Ryan to the plaintiff, the name of the defendant, Briggs, was written on the back of it, and the courts say that, according to several decisions it was right to declare against him as promisor, though he stood in the relation of surety to Ryan, who signed the note on the face of it.

The case of Chaffee *v.* Jones, 19 Pick. 260, was assumpsit on a note signed by Israel A. Jones, as principal, and Eber Jones and E. Owen & Sons, as sureties, by which they jointly and severally promised to pay the president, etc., of the Housatonic Bank, or their order; and the plaintiff put his name on the back of the note, in blank. The plaintiff was called upon, after the neglect of the makers, and he paid it to the bank. The court held that where one, not a promisor nor indorser, puts his name on a note, meaning to make himself liable with the promisor, he is to be regarded as a joint promisor and surety. He is not liable as indorser, for the note is not negotiated, nor a title made to it, through his indorsement; nor as guarantor, there being no distinct consideration; but he means to give security and validity to the note by his credit and promise, and it is immaterial, for this purpose, on what part of the note he places his name. So in Austin *v.* Boyd, 24 Pick. 64, where the defendant's name was, in like manner, on the note, it was held that the party, by thus putting his name on the back, makes himself an original promisor. He intends by it to give credit to the note.

The case of Samson *v.* Thornton, 3 Met. 275, was assumpsit on a note made by Benjamin Russell to the plaintiff, and was indorsed by the defendant Thornton; and the declaration charged him as an original promisor. The court there ruled that the defendant, not being the payee of the note, must be held to stand in the character of an original joint promisor and surety.

The case of Richardson *v.* Lincoln, 5 Met. 201, is of the same type. There the court held that the defendant, not being payee, but having put his name in blank on the note, must be considered as an original promisor and surety, if

he put it on simultaneously with the promisor, as an original contractor. See also Sumner *v.* Gay, 4 Pick. 311.

The same questions have arisen in New York in various cases, and have been decided in a similar manner.[1] They will be found cited in Story on Notes, §§ 59, 472–480, where the subject is fully discussed, and the authorities examined.

To hold the party, however, as promisor, where the name alone is written, it must appear that he made the promise at the time when the note itself was made; otherwise, he may either not be chargeable at all, or be chargeable as surety or guarantor, according to the facts proved. Carver *v.* Warren, 5 Mass. 545; Tenney *v.* Prince, 4 Pick. 385; Baker *v.* Briggs, 8 Pick. 122, 130; Oxford Bank *v.* Haynes, 8 Pick. 423; Story on Notes, §§ 473, 474; Beckwith *v.* Angell, 6 Conn. 315. But that the promise was made at the same time with the note is a fact which is to be presumed when the note is in the hands of a bona fide holder, and nothing is shown to the contrary. And, in the present case, the note was offered to the plaintiffs for discount by the maker himself, with the names of Mirick & Co. and Willis on the back of it; showing it, therefore, to have been an original undertaking on their part.

It was contended, in the argument, that Mirick & Co. were merely sureties, and that the plaintiffs had a right to treat them as such, and therefore were not bound to demand payment of them as makers, as a necessary step to enable them to charge the indorser; the relation of promisor, surety, and guarantor being distinct. There is, unquestionably, a distinction between these several undertakings; and always so in regard to a mere guarantor. But as to the subsisting relations between a principal and surety, they rarely affect the contract between the creditor and surety. A man may be equally a surety and an original promisor; as where the promise is, I, A B, as principal, and I, C D, as surety, promise to pay; or where the party signs, and adds to his name the word 'surety.' This does not make him

[1] A mistake. See ante, p. 29; Bills and Notes (Students' Series), 33.

less a promisor. It only defines the relation between him and his co-promisor; and, as promisor, the necessity of a presentment to him is not dispensed with, if the intention of the holder of the note is to charge the indorser. It is not for the holder to choose in what character he will consider the party who has put his name on the note; but he must treat him as sustaining that legal relation which the facts establish. If he put his name on the note at the time it was made, like the case at bar, he is a promisor; if after the making of the paper, he is a surety or a guarantor, according to the agreement upon which he gives his signature. The fixing of the relation of the party, when he enters into the contract, is necessary for the protection of holders, and for guarding the rights of indorsers whose liability is conditional. If it were held otherwise, I do not well see how such contracts could be supported against the objection of being void as within the Statute of Frauds. And, as it is, I consider these engagements rather as exceptions to the statute than in any other light, and as growing out of, or rather ingrafted upon, the law merchant applicable to regularly drawn bills of exchange and promissory notes.

Upon this view of the law, as drawn from the various cases, we consider Mirick & Co. to have been joint and several promisors with Thompson, and liable in like manner with him.

See Bills and Notes (Students' Series), 105, note.

matter of pleading that Clarke was not held as maker of promissory note.

DAVIS v. CLARKE.

Queen's Bench of England, Trinity, 1844. 6 Q. B. 16.

John Hart drew a bill payable to himself or order, addressed to John Hart. C wrote across this, 'accepted, H J C.' Held, that C could not be sued as acceptor of a bill of exchange directed to him.

Assumpsit. The first count stated that 'one John Hart,' on 8th March, 1838, 'made his bill of exchange in writing and directed the same to the defendant, and thereby

required the defendant to pay to him or his order £100,' value received, at twelve months after date, which had elapsed, etc., 'and the defendant then accepted the said bill, and the said John Hart then indorsed the same to the plaintiff;' averment of notice to defendant, promise by him to pay plaintiff, and that he did not pay. There was also a count on an account stated.

The first plea denied the acceptance; the second the promise; the third alleged a discharge of defendant by the Insolvent Debtors' Court. Replication joining issue on the first two pleas, and traversing the discharge alleged in the third, on which issue was joined.

On the trial a written paper, in the following terms, was given in evidence for the plaintiff: —

'£100.

'London, 8th March, 1838.

'Twelve months after date pay to me or my order one hundred pounds, value received.

'John Hart.

'To Mr. John Hart.'

Across the face of this instrument was written, in defendant's hand, 'Accepted. H. J. Clarke, payable at 319 Strand.'

No other evidence being produced, the court directed a nonsuit. Case argued on a rule nisi for a new trial.

Lord Denman, C. J. — There is no authority, either in the English law or the general law merchant, for holding a party to be liable as acceptor upon a bill addressed to another. We must take it on this instrument that the defendant is different from the party to whom it is addressed. Polhill *v.* Walter, 3 B. & Ad. 114, and Jackson *v.* Hudson, 2 Campb. 447, are authorities showing that the defendant here cannot be sued as acceptor. In Jackson *v.* Hudson, Lord Ellenborough treated an acceptance by a party not addressed as 'contrary to the usage and custom of merchants.'

PATTESON, J. — No previous case seems to be exactly like this. In Jackson *v.* Hudson, 2 Campb. 447, there was one acceptance by the party to whom the bill was addressed, prior to the acceptance by the defendant. In Gray *v.* Milner, 8 Taunt. 739, no party was named in the address; and I must say that the decision in that case appears to me to go to the extremity of what is convenient. It may be considered as having been decided on the ground that the acceptance was not inconsistent with the address, so that the acceptor might be deemed to have admitted himself to be the party addressed. But here another person, the drawer himself, is named in the address. I do not know that a party may not address a bill to himself, and accept, though the proceeding would be absurd enough. Then it is said that the defendant is estopped; but that cannot be supported where the instrument shows, on its face, that he cannot be the acceptor.

WILLIAMS, J. — The only question is, whether the defendant is such an acceptor as is described in the declaration; that is, of a bill of exchange directed to him. No doubt this can be so only where he is the drawee; but here the bill is not addressed to the defendant at all. This is therefore not an acceptance within the custom of merchants.

COLERIDGE, J. — The safe course is to adhere to the mercantile rule that an acceptance can be made only by the party addressed, or for his honor. Here the last is not pretended, and the first cannot be presumed. If the John Hart addressed is different from the John Hart who draws, there is still no acceptance; if the same, then the instrument is a promissory note, and not a bill of exchange.

Rule discharged.

SPEAR *v.* PRATT.

Supreme Court of New York, May, 1842. 2 Hill, 582.

If the drawee of a bill of exchange write his name across the face of the bill, this binds him as an acceptor, though statute requires acceptance to be in writing, and signed by the acceptor or his agent.

Assumpsit against the drawee as acceptor of a bill of exchange, the drawee having simply written his name across the instrument. The statutes of New York, which govern the case, require acceptance to be in writing and signed by the acceptor. Judgment for the plaintiff by direction of the judge. Motion for a new trial.

COWEN, J., for the court. — Any words written by the drawee on a bill, not putting a direct negative upon its request, as 'accepted,' 'presented,' 'seen,' *the day of the month*, or a direction to a third person to pay it, is prima facie a complete acceptance, by the law merchant. Bayley on Bills, 163, Am. ed. of 1836, and the cases there cited. Writing his name across the bill, as in this case, is a still clearer indication of intent, and a very common mode of acceptance. This is treated by the law merchant as a written acceptance, — a signing by the drawee. 'It may be,' says Chitty, 'merely by writing his name at the bottom or across the bill;' and he mentions this as among the more usual modes of acceptance. Chit. on Bills, 320, Am. ed. of 1839.

It is supposed that the rule has been altered by 1 Rev. St. 757, 2d ed. § 6. This requires the acceptance to be *in writing*, and *signed* by the acceptor or his agent. The acceptance in question was, as we have seen, declared by the law merchant to be both a *writing* and *signing*. The statute contains no declaration that it should be considered less. An indorsement must be *in writing* and *signed;* yet the name alone is constantly holden to satisfy the requisition. No particular form of expression is necessary in any

contract. The customary import of a word, by reason of its appearing in a particular place and standing in a certain relation, is considered a written expression of intent quite as full and effectual as if pains had been taken to throw it into the most labored periphrase. It is said the revisors, in their note, refer to the French law as the basis of the legislation which they recommended; and that the French law requires more than the drawee's name, — the word *accepted*, at least. That may be so; but it is enough for us to see that both the terms and the spirit of the act may be satisfied short of that word, and more in accordance with the settled forms of commercial instruments in analogous cases. The whole purpose was probably to obviate the inconveniences of the old law, which gave effect to a parol acceptance. *New trial denied.*

EXCHANGE BANK OF ST. LOUIS *v.* RICE.

Supreme Court of Massachusetts, March, 1871. 107 Mass. 37.
(See 98 Mass. 288.)

No action can be maintained upon a promise to accept a bill of exchange by one who has purchased the bill before he knew of the promise.

A promise to accept made to the drawer, not acting for the holder, does not extend to the holder.

Appeal from a judgment for the defendant in contract on the following agreed statement of facts:

'On March 8, 1865, John P. Hill, at St. Louis, drew on the defendants, commission merchants in Boston, a draft for $3,300, payable thirty days after date to the order of R. R. Pitman & Co., and containing on its face a memorandum in the terms following: "against 12 bales cotton." On the same day the draft was indorsed to and discounted in the usual course of business by the plaintiffs, and on March 15 was presented by them to the defendants, at Boston, who caused it to be noted for non-acceptance. On March 8 Hill wrote to the defendants as follows: "I ship

you to-day per Merritt's Express 12 bales, weighing 5,489 pounds, on which I have drawn on you at 30 days for $3,300." To this letter the defendants replied on March 14 as follows: "We now have the pleasure to acknowledge your favor of the 8th. Your shipment 12 bales cotton per Merritt's Express will receive due attention. Bill of lading not at hand. Your draft for $3,300 is excessive, particularly as we shall have no margin on previous shipments, as the market now looks. We will honor the same, but shall expect you, on receipt of this, to make us shipment of cotton to cover the margin." And on March 15 they again wrote to Hill as follows: "Market for cotton continues weak. Have no bill lading 12 bales reported as shipped yesterday, and we have felt obliged therefore to have your draft for $3,300 noted for non-acceptance. When bill lading is received, will accept draft." The said bill of lading of the cotton ran to the defendants or order, and was received by them March 17, 1865.

'The defendants' letter of March 15 was shown to the plaintiffs by R. R. Pitman & Co., March 22, 1865. The plaintiffs thereupon procured said letter, and the duplicate bill of lading, of Pitman & Co., and on March 27 again presented the draft, with the defendants' said letter and the duplicate bill of lading attached, to the defendants for acceptance. But the defendants declined to accept the same, and afterwards declined to pay, and they have never paid the same or any part thereof, and the same was duly protested for non-acceptance and non-payment. The twelve bales of cotton were received by the defendants on April 17, and were sold by them on April 21 for $1,349 net, which sum they credited in their account with Hill, upon which a balance then was and still is due to the defendants.'

GRAY, J., for the court. — It has already been decided in this case, upon proof of substantially the same facts which are now agreed by the parties, that the plaintiffs could not sue the defendants as acceptors of the draft,

because their promise to the drawer to accept it, having been made after the draft had been negotiated to the plaintiffs, did not amount to an acceptance; and the memorandum at the foot of the draft, that it was drawn against twelve bales of cotton, could have no more effect to charge the defendants as acceptors than the mere signature of the drawer, which of itself always imports a promise that he will have funds in the hands of the drawee to meet the draft. 98 Mass. 288.

The defendants' promise to the drawer to accept the draft was a mere chose in action, not negotiable, and upon which no one but he to whom it was made could maintain an action. Worcester Bank *v.* Wells, 8 Met. 107; Luff *v.* Pope, 5 Hill, 413, and 7 Hill, 577.

The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this Commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it.

The unguarded expressions of Chief Justice Shaw in Carnegie *v.* Morrison, 2 Met. 381, and Mr. Justice Bigelow in Brewer *v.* Dyer, 7 Cush. 337, to the contrary, on which the learned counsel for the plaintiffs relied at the argument, were afterwards, and while those two distinguished judges continued to hold seats upon this bench, qualified, the limits of the doctrine defined, and a disinclination repeatedly expressed to admit new exceptions to the general rule, in unanimous judgments of the court, drawn up by Mr. Justice Metcalf, and marked by his characteristic legal learning and cautious precision of statement. Mellen *v.* Whipple, 1 Gray, 317; Millard *v.* Baldwin, 3 Gray, 484; Field *v.* Crawford, 6 Gray, 116; Dow *v.* Clark, 7 Gray, 198. Those judgments have since been

treated as settling the law of Massachusetts upon this subject. Colburn *v.* Phillips, 13 Gray, 64; Flint *v.* Pierce, 99 Mass. 68.

The first and principal exception stated by Mr. Justice Metcalf to the general rule consists of those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly, or by implication from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors. That class of cases, as was pointed out in 1 Gray, 322, includes Carnegie *v.* Morrison and most of the earlier cases in this Commonwealth, as well as the later cases of Frost *v.* Gage, 1 Allen, 262, and Putnam *v.* Field, 103 Mass. 556.

The only illustration which the decisions of this court afford of Mr. Justice Metcalf's second class of exceptions is Felton *v.* Dickinson, 10 Mass. 287, in which it was held, in accordance with a number of early English authorities, and hardly argued against, that a son might sue upon a promise made for his benefit to his father. Those cases, with the proposition on which they have sometimes been supposed to rest, that, by reason of the near relation between parent and child, the latter might be thought to have an interest in the consideration and the contract, and the former to have entered into the contract as his agent, are not now law in England. Tweddle *v.* Atkinson, 1 B. & S. 393; Addison on Con. (6th ed.) 1040; Dicey on Parties, 84. And this case does not require us to consider whether they ought still to be followed here.

The third exception admitted by Mr. Justice Metcalf is the case of Brewer *v.* Dyer, 7 Cush. 337, in which the defendant made a written promise to the lessee of a shop to take his lease (which was under seal) and pay the rent to the lessor according to its terms, entered into posses-

sion of the shop with the lessor's knowledge, paid him the rent quarterly for a year, and then before the expiration of the lease left the shop, and was held liable to an action by the lessor for the rent subsequently accruing. That case may perhaps be supported on the ground that such payment and receipt of the rent, after the agreement between the defendant and the lessee, warranted the inference of a direct promise by the defendant to the lessor to pay the rent to him for the residue of the term. See McFarlan *v.* Watson, 3 Comst. 286. It certainly cannot be reconciled with the later authorities without limiting it to its own special circumstances, and affords no safe guide in the decision of the present case.

The plaintiffs are then obliged to fall back upon the first exception to the general rule. But they fail to bring their case within that exception or within any of the authorities to which they have referred us.

In Carnegie *v.* Morrison, 2 Met. 281, the defendants, having funds in cash or credit of the plaintiffs' debtor, gave him a letter of credit, which was shown to the plaintiffs, and on the faith of which they drew the bill for the amount of which they sued the defendants; and the drawing of that bill, whereby they made themselves liable to the drawee[1] thereof, was a consideration moving from them. In Lilly *v.* Hays, 5 Ad. & E. 548; s. c. 1 Nev. & Per. 26, the defendant, as the jury found, had authorized the plaintiff to be told that the defendant had received the money to his use, and thus promised the plaintiff to pay it to him. So in Walker *v.* Rostron, 9 M. & W. 411, the defendant had promised the plaintiff to pay the sum in question. And the rule established by the modern cases in England, as laid down in the text books cited for the plaintiffs, does not permit the person for whose benefit a promise is made to another person from whom the only consideration moves to maintain an action against the promisor, unless the latter has also made an express promise to the plaintiff, or the

[1] A slip for payee.

promisee acted as the plaintiff's agent merely. Met. Con. 209; Addison on Con. (6th ed.) 630, 1041; Chit. Con. (8th ed.) 53. Where the promisee is in fact acting as the agent of a third person, although that is unknown to the promisor, the principal is the real party to the contract, and may therefore sue in his own name on the promise made to his agent. Sims *v.* Bond, 5 B. & Ad. 389; s. c. 2 Nev. & Man. 608; Huntington *v.* Knox, 7 Cush. 371; Barry *v.* Page, 10 Gray, 398; Hunter *v.* Giddings, 97 Mass. 41; Ford *v.* Williams, 21 How. 287.

In the case at bar the plaintiffs had acquired no title in the cotton against which the draft was drawn. The bill of lading was not attached to the draft, or made payable to the holder thereof, or delivered to the plaintiffs. The case is thus distinguished from Allin *v.* Williams, 12 Pick. 297, and Michigan State Bank *v.* Gardner, 15 Gray, 362, cited at the argument. The cotton was not of sufficient value to pay the draft, and the balance of account between the defendants and the drawer, at the time of their receipt and sale of the cotton, and ever since, was in favor of the defendants. There is no ground, therefore, for implying a promise from the defendants to the plaintiffs to pay to them either the amount of the draft or the proceeds of the cotton. Tiernan *v.* Jackson, 5 Pet. 580; Cowperthwaite *v.* Sheffield, 1 Sandf. 416, and 3 Comst. 243; Winter *v.* Drury, 1 Selden, 525; Yates *v.* Bell, 3 B. & Ald. 643. The plaintiffs did not take the draft, or make advances, upon the faith of any promise of the defendants, or of any actual receipt by them of the cotton or the bill of lading, but solely upon the faith of the drawer's signature and implied promise that the defendants should have funds to meet the draft. The whole consideration for the defendants' promise moved from the drawer, and not from the plaintiffs. And the defendants made no promise to the plaintiffs. Their only promise to accept the draft was made to Hill, the drawer, after the draft had been negotiated to the plaintiffs; and there is no proof that the defendants authorized that promise to be

shown to the plaintiffs, or that Hill, to whom that promise was made, was an agent of the plaintiffs. His relation to them was that of drawer and payee, not of agent and principal. To infer, as suggested in behalf of the plaintiffs, that he was their agent in receiving the defendants' promise, so that they might sue thereon in their own name, would be unsupported by any facts in the case, and would be an evasion of the rules of law, which will not allow any person who took the draft before that promise was made to maintain an action upon that promise either as an acceptance or a promise to accept. *Judgment for the defendants.*

In many of the States one for whose benefit a promise is made may sue upon it though he was not privy to the promise or to the consideration. But that, in so far as it is received doctrine, is received as doctrine of the common law, and not, it is apprehended, as doctrine of the law merchant applicable to cases like that supra. And in any event the promise so treated would not be treated, further, as negotiable.

One's rights may, generally speaking, be transferred to another; but the right of the drawer of a bill of exchange or of a cheque to have his draft honored, where he has such a right, cannot be transferred with the draft to the holder of the same; otherwise there would be nothing, or next to nothing, in the rule of the law merchant that the drawee of a bill or cheque is and can be under no liability to the holder (apart from a sufficient promise to him to accept) until he has accepted the one or certified the other. Nor can the circumstance that the drawee may have promised the drawer that he will honor the draft make any difference, where the drawer is not an agent of the holder; for in the case supposed he was bound to honor the draft, so that the promise has added nothing to the case.

Of course this is not saying that this particular right of the drawer may not pass to an assignee in bankruptcy or insolvency; that is a very different thing.

HENRIETTA NATIONAL BANK *v.* STATE NATIONAL BANK.

Supreme Court of Texas, 1891. 80 Texas, 648.

To maintain an action upon a promise to pay a cheque the promise need not be made upon a full and perfect description; enough that the cheque comes fairly within the scope of the promise.

Distinction between acceptance of and promise to accept a bill of exchange.

Action on a promise to pay a cheque.

GAINES, Assoc. Justice, for the court. — This suit was brought by the appellee to recover of the Henrietta National Bank and Frank Brown, as its receiver, the amount of a cheque drawn upon it by E. F. and W. S. Ikard.

On the 22d of July, 1887, E. F. and W. S. Ikard drew a cheque on the defendant bank in favor of one T. F. West for $1,800. West indorsed and delivered it to one Atkinson, who on the next day presented it to the cashier of the plaintiff bank at Fort Worth with the request that he cash it. The cashier immediately telegraphed the defendant bank as follows: 'Will you pay E. F. and W. S. Ikard's cheque for $1,800 on presentation?' The cashier of the defendant bank on the same day replied by telegram, 'Yes; will pay the Ikard cheque.' Upon the receipt of this telegram the plaintiff discounted the paper, and the holder transferred it to the bank by indorsement and delivery. The cheque was immediately sent by mail to the defendant bank with a request to remit the amount to the plaintiff. The letter reached Henrietta on Sunday, and on Monday before banking hours the directors of the defendant bank determined to suspend payment, and thereafter its doors were not opened for regular business.

The court having given judgment for the plaintiff for the full amount of the cheque and interest, and the defendants having appealed, they now complain in effect that the correspondence by telegraph between the two banks did not

sufficiently describe the cheque so as to make the promise of the defendant bank an acceptance. The authority mainly relied upon by appellants' counsel in support of their contention is the case of Coolidge *v.* Payson, 2 Wheat. 66. In that case Chief Justice Marshall says: 'Upon a review of the cases which are reported this court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise.' The doctrine was re-affirmed in the same court in the cases of Schimmelpennick *v.* Bayard, 1 Pet. 284, and Boyce *v.* Edwards, 4 Pet. 111, and has been frequently followed in other courts. Whether according to the rules laid down the correspondence should show any more than the amount and character of the bill as to the time of payment we need not here inquire, though it would seem that such a description ought to be sufficient according to the most rigid rule recognized by any court.

The rule, however, applies only to a case in which it is sought to charge the defendant as the acceptor of the bill. Cases may arise in which the party who has promised to accept may be held liable upon the promise, although such promise may not be deemed equivalent to a formal acceptance. A practical difference between an action upon an acceptance and one upon a promise to accept is that the former may be brought by the holder of the bill, while the latter suit can only be maintained by the party to whom the promise is made. In this case the promise to pay the bill [1] was made directly to the plaintiff, and it was upon the faith of that promise that the cheque was discounted. The suit is not brought upon an alleged acceptance. The petition states the facts in detail and seeks a recovery for the breach of the promise to pay the cheque. In Boyce *v.* Edwards, supra, the Supreme Court of the United States

[1] A slip, it seems, for cheque.

says: 'The distinction between an action on a bill as an accepted bill and one founded on a breach of promise to accept seems not to have been adverted to. But the evidence to support the one or the other is materially different. To maintain the former, as has already been shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter the evidence may be of a more general character, and the authority to draw may be collected from circumstances and extended to all bills coming fairly within the scope of the promise.' It is clear that the promise in the case before us was sufficiently definite to support an action for a failure or refusal to pay the cheque described in the petition, if not sufficiently specific to authorize its being treated as an acceptance.

The cheque offered in evidence contained the character and figures '$1,800.00,' but in the body a line appeared to have been drawn through the word 'hundred.' If the word was intended to be erased, it was a cheque for $18 only; if not, it was a cheque for $1,800. The line appears to have been drawn along the top of the word, rather than through it, and it is not at all clear that even without explanation it should be held to be an erasure. The member of the firm who drew the cheque testified that it was intended to be a cheque for $1,800, and that he thought the line was upon the blank when the cheque was written. The circumstances attending the whole transaction leave no doubt that the purpose was to draw a cheque for the amount claimed by the plaintiff, and that the line was either upon the paper when the cheque was drawn and was not discovered, or that it was subsequently placed there by some accident. That it was competent to prove that a mark of this character was not intended as an erasure, especially when the figures in the margin tend to show the same fact, we have no doubt. Sharswood's Starkie on Ev. 500. The defendants introduced testimony tending to show that a prudent banker would not have paid the cheque, at least without inquiry

as to the intention of the drawers in executing it. This may be true, but so far as this case is concerned it is a fact of no importance. It was nevertheless the duty of the defendant bank to pay the cheque. An inquiry would have shown beyond doubt that it was a cheque for $1,800, and though the apparent erasure may have justified a delay of a reasonable time to make inquiry, it did not justify a final refusal to pay.

We find no error in the judgment, and it is

Affirmed.

CAREW *v.* DUCKWORTH.

Court of Exchequer of England, Trinity, 1869. L. R. 4 Ex. 313.

Notice of dishonor need not be given to the drawer of a cheque having no sufficient effects in the hands of the drawee to meet the cheque, and no reasonable ground to expect that the cheque will be paid. Meaning of 'sufficient effects' and 'reasonable ground.'

Declaration by plaintiff as holder of the defendant's cheque on the Agra Bank, Limited, for £30, averring due presentment and non-payment, and excusing notice of dishonor on the ground that the bank 'had not in their hands sufficient or any effects of the defendant for payment of the said cheque or order, nor had they received any consideration for the payment by them of the said cheque or order, nor had the defendant at any time any reasonable ground to expect that the said Agra Bank, Limited, would pay the said cheque or order, nor has the defendant sustained any damage by reason of not having notice of the non-payment by the said Agra Bank, Limited, of the said cheque or order.'[1]

Plea traversing the averments excusing notice. Issue.

It was proved that the cheque was given after banking hours on the 25th of February, and it was then agreed that

[1] The presumptive duty to notify the drawer of a *cheque* of its dishonor should be noticed. See Chitty, Precedents in Pleading, 117, 3d Eng. ed., whose form is followed supra, and is approved in Kemble *v.* Mills, 1 M. & G. 757, 769; Bills and Notes (Students' Series), p. 53.

it should not be presented for several days. The defendant then had £106 in the bank. The cheque was presented on the 10th of March, and dishonored.

On the morning of March 2d the balance in the defendant's favor was £18 17*s.* 2*d.*; in the course of the day £48 6*s.* 8*d.* was paid in, and £58 5*s.* 2*d.* was drawn out, leaving a balance of £8 18*s.* 8*d.*; and from that day to the 10th of March the largest sum in the bank to the defendant's credit was £9 8*s.* 4*d.* On the 10th £107 was paid in, and £99 drawn out, which left to the defendant's credit a balance of £1 15*s.* 11*d.*

It was also proved that the defendant had on a former occasion overdrawn his account, and that the bank had thereupon given him notice they would not honor overdrafts.

The jury found all the averments of the declaration in favor of the plaintiff. A verdict was entered for the plaintiff, with leave to the defendant to enter a verdict for him. A rule having been obtained accordingly, and for a new trial, on the ground that the verdict was against evidence, the cause came to argument.

Bramwell, B. — I cannot think that the law on this point is in a very satisfactory condition. The true rule should be, that no notice of dishonor is required where it would convey no information, that is, when the party sued knew beforehand that the bill would not be paid; but that when he did not know, it is right that he should be informed of the non-payment. If this rule should be adopted, the question would be, did he, practically speaking, know beforehand that the bill would not be honored? This may depend upon a variety of circumstances; he might think that the cheque would be honored by favor, though in fact there were no assets to meet it. But though this ought to be the rule, at all events in the case of cheques (and I am not sure that it is not the rule in fact), yet it is not always to be found laid down in those terms, and perhaps it could not be established without doing violence to some of the cases.

The first question, then, is, had the defendant funds in the hands of the bank to meet this cheque? Which here becomes the question, whether there was evidence from which the jury could find this fact in the negative. The defendant had the sum of £106 in the bank at the time when he drew the cheque, but the question of his right to notice of dishonor must be considered in connection with his request that the cheque should not be presented for several days. Now the important question is, whether the drawer thinks that there will be funds to meet the draft, whether bill or cheque, when it is presented for payment. If I, in London, draw on a bank in York, where I have £1,000, which I know will be drawn out to-day, while the cheque cannot be presented till to-morrow, it is idle to say that, knowing there will be no funds there at any time when the cheque can be presented, I am entitled to notice of dishonor. The question therefore is, what was the state of the funds at the time when the bill ought in regular course to have been presented? Then the question arises, what is the meaning of several days or a few days? The jury may well have thought that it at least postponed the presentment till the 2d of March. Now from March the 2d till the 10th, when the cheque was actually presented, there was not at any time a greater sum than £9 8*s.* 4*d.* available for its payment. There was evidence in the accounts to show that the defendant paid in money to his account, but he at once drew out as much as he paid in, or the money was so paid in and dealt with that it was not applicable to the payment of this cheque. This was evidence on which the jury might find that the defendant had not, in fact, funds in the bank at the time when the bill was presented.

But Mr. Sharpe [for the defendant] says, that if there were any funds, the defendant was entitled to notice of dishonor. This cannot be so; the question must be whether, practically, there were funds to such an amount as that at the time of drawing he could reasonably expect payment. For though the expression 'any funds' is used in some

cases, it is preposterous to suppose that, because there was an old balance of £50 to the credit of a customer, he would thereby be entitled to notice of dishonor of a cheque for £5,000. The question then must be, whether there were any such funds as the drawer might reasonably and properly draw against, with an expectation that the draft would be honored. We may read the allegations in the declaration that the defendant had not sufficient, nor any, funds for the payment of the cheque, as meaning that he had no funds adequate for its payment, no funds against which he was entitled to draw the cheque in question. Therefore, as to this first question, I think there was evidence for the jury that there were no such funds in hand, from the time when the defendant would expect the cheque to be presented up to the time when it was presented in fact, as to give him ground to suppose that the cheque would be honored; and I think that this fact was rightly so found. Secondly, it is quite plain that there was evidence for the jury that the defendant had no reason to expect that the cheque would be honored; and I also think that they were right in so finding. There were eight entire days after the time when the defendant might first expect the cheque to be presented, on none of which had he any reason to expect that it would be paid, for he had no right to expect that any cheque would be paid which he had not sufficient effects to meet.

CHANNELL, B. — I am of the same opinion. There is no ground for saying either that the verdict was against evidence, or that there was no evidence to go to the jury in support of the declaration. The evidence was that the cheque was not to be presented for a few days; the jury have found that when it was presented a reasonable time had elapsed; and I think they were warranted in so finding. There had been then eight days during which there were no funds in the hands of the bank to meet the cheque. There is therefore no ground to contend that the defendant had a reasonable expectation of the cheque being paid; and

the case bears no resemblance to cases where funds might be expected to come in, — as, for instance, in the case of a landlord whose tenants were accustomed to pay their rents into the bank, and who had therefore a right to expect there would be assets to meet his draft, and might perhaps, for want of notice, lose his opportunity of recovering rent by distress.

CLEASBY, B. — I am also of the same opinion. The issue is distinct, and involves the question whether the defendant had reasonable ground for expecting that the cheque would be paid. That this is a material question appears from Kemble *v.* Mills, 1 M. & G. 757, 761, where the declaration being objected to, Tindal, C. J., says: 'I suppose the objection is, that it is not stated that the defendant had no reason to expect that the bill would be paid;' this shows (though the declaration was in that case held sufficient) that the allegation of want of reasonable ground for the expectation of payment is an important and a necessary averment, and is therefore an essential matter for consideration. The existence of such reasonable ground must obviously be a question for the jury. Now, here the cheque was given with a request that it should not be presented for a few days; but it is nevertheless said that if at the time of drawing it there were funds the drawer is entitled to notice of dishonor. But can it be said that after a cheque has been given with such a request, and its drawer next day draws out the whole of his funds, and never afterwards pays in a farthing, nor has any reasonable expectation of funds coming in, so that he must well know that there never can be any funds to meet the cheque, he is not completely aware that the cheque will not be paid in fact? Then put the case of a small sum being paid in, quite insufficient to satisfy the cheque, the question will still be, was there any reasonable expectation that there would be funds to meet the cheque? The jury have found that the defendant had no reasonable expectation that the cheque would be

paid, and I think there was sufficient ground for that finding.

BRAMWELL, B. — I wish to add, that if there were funds in the hands of the bank sufficient to meet the cheque, the drawer would be entitled to notice though he knew that the bank would not honor the cheque, for he would be entitled to say they were bound to honor it, even though they had told him they would not. *Rule discharged.*

KINYON *v.* STANTON.

Supreme Court of Wisconsin, January, 1878. 44 Wis. 479.

If neglect on the part of the holder of a cheque to present the same within the usual time does not prejudice the drawer, the drawer is not thereby discharged.

Action against the drawers for the amount of a cheque on the Corn Exchange Bank of Waupun in favor of the plaintiff. The cheque was never presented for payment, and some eight days after it was drawn the bank closed its doors; three weeks later it was adjudged bankrupt. From the time the cheque was drawn until the bank suspended payment the drawers had more than enough money in the bank to meet the cheque. The cheque might have been presented in the interval; and the bank would then have honored it down to the day of closing, even without regard to the state of the defendant's account. Just before, and on the day the bank suspended payment, the defendants, having heard rumors affecting the bank, drew out all their funds, part in favor of themselves, part in favor of another. The defendants some days later refused to pay the cheque. For the sum drawn out by the defendants for themselves an action was afterwards successfully brought by the bank's assignee, in the federal court.

Judgment for the plaintiff for the full sum; defendants appealed.

RYAN, C. J., for the court. — Doubtless the respondent was guilty of negligence in holding the cheque of the appellants so long without presenting it to the bank for payment. And if the appellants had left funds in the bank to meet it until the failure of the bank, the negligence of the respondent would have discharged the appellants from all liability over. Jones v. Heiliger, 36 Wis. 149.

But the appellants saw fit to draw out their entire account in the bank before its failure; and doing so, must be held in good faith to have intended, as they are liable, themselves to protect the cheque which they had given to the respondent. And so the negligence of the respondent did not prejudice the appellants.

This view is not affected by the fact that the bank would probably have paid the cheque, without regard to the state of the appellants' account, at any time before the day of the bank's failure. On that day the bank apparently would not have honored the cheque without funds of the appellants sufficient to meet it. If at any time the bank had paid the cheque without funds of the appellants, they would have been liable to the bank for the amount advanced to pay it. It was immaterial to them whether they should owe the amount to the bank or to the respondent. Certain it is that they must owe it to one or the other. And they elected to owe it to the respondent. As between the parties here the appellants could have escaped liability over only by leaving funds in the bank to meet the cheque, from the day it was given until the failure of the bank. They cannot expect to draw all their funds from the bank before its failure, and then escape liability upon a cheque previously drawn, merely because the bank failed.

It makes no difference in the relation of the parties that the assignee of the bank in bankruptcy afterwards recovered against the appellants the balance which they drew out in favor of themselves on the day of the failure, and

in view of it. That recovery went upon what the federal court must have held a fraud upon the bankrupt law. The state law gave them perfect right to do as they did. And the recovery in the federal court, even if the amount had been sufficient to pay the cheque, leaves the fact untouched that the appellants had in fact withdrawn all their funds from the bank, leaving nothing to meet the cheque which they had given to the respondent.

By the court. The judgment of the court below is *Affirmed.*

BURKHALTER *v.* SECOND NATIONAL BANK OF ERIE.

Court of Appeals of New York, March, 1870. 42 N. Y. 538.

The indorsee of a draft on demand may, on the day he has taken it, receive from the drawee a cheque upon another, and present the cheque on the day following; and if the cheque is then dishonored, and the draft reclaimed by such indorsee and presented again to the drawee thereof on the same day and dishonored, the indorsee fixes the liability of the drawer by immediate protest, followed the next day by notice of dishonor, though the drawer of the draft had funds in the hands of the drawee on the day on which the indorsee received it, and though the drawee would have paid it on that day or early the next day, on which latter day the drawer of the draft failed.

Action against the drawer of a draft on demand. On the morning of the 26th of March, 1866, the plaintiffs in New York received by mail a draft on Culver, Penn, & Co. for $1,116.89, in favor of Johnson & Brevillier, and by them indorsed and sent to the plaintiffs. The plaintiffs presented the draft immediately to the drawees, and received in lieu thereof the drawees' cheque on the Third National Bank of New York for the same amount. On the 27th of March this cheque went into the clearing house for payment, and was dishonored, the drawees, Culver, Penn, & Co., having failed on that day. The cheque was returned to them, and the original draft sent back to the

plaintiffs on the same 27th of March. That draft was on that day, late in the afternoon, presented to the drawees, Culver, Penn & Co., by a notary, and dishonored. Immediate protest, and notice of dishonor to the defendant on the 28th of March, followed.

On the 26th of March the drawer had sufficient funds in the hands of Culver, Penn, & Co. to meet the draft; Culver, Penn, & Co. had in hand the whole day $12,000 or more. The draft would probably have been paid in money, had it been presented on March 26 or early on March 27; though Culver, Penn, & Co. could not have paid in money all the drafts on them presented that day.

The defendant, supposing that it was liable on the first draft, gave another in lieu of it, and suit was brought upon the new draft. Defence, that it was given under mistake, and that the defendant was not liable upon the first draft.

Judgment for plaintiffs; defendant appealed.

EARL, C. J., for the court. — The plaintiffs were bound to demand payment of the first draft on the day they received it (March 26) or the next day (March 27), and they had the *right* to hold it until the 27th. The draft being payable on demand, they were bound to use reasonable diligence in demanding payment, and a demand on the same day, or the next day, is, in the law, a demand within a reasonable time. Chit. on Bills, 377, Springfield ed. of 1842; Harker *v.* Anderson, 21 Wend. 372; Smith *v.* Jones, 20 Wend. 192; Benton *v.* Martin, 31 N. Y. 385; Merchants' Bank *v.* Spicer, 6 Wend. 443; Hazleton *v.* Colburn, 2 Abb. N. S. 199. It was sufficient to give the notice of demand and refusal on the next day, the 28th of March. Farmers' Bank of Bridgeport *v.* Vail, 21 N. Y. 485; Howard *v.* Ives, 1 Hill, 263.

Therefore in demanding payment of this draft on the 27th, and mailing notices of non-payment on the 28th, the plaintiffs did all that the law required of them, and the defendant was charged as drawer of the draft, unless it

was discharged by what took place on the 26th. On that day the draft was neither paid nor refused to be paid. Culver, Penn, & Co. gave their cheque for it, and the cheque was in due time, the next day, in the ordinary course of business, through the clearing house, presented for payment and payment refused. There was no agreement to receive the cheque in payment. It was taken by the plaintiffs in the usual course of business, they believing that it would be paid. They then, on the 27th, returned the cheque and reclaimed the draft, and demanded payment upon it. The cheque did not for a moment operate as a payment of the draft, and the whole transaction does not show the absence of any diligence which the defendant had a right to demand of the plaintiffs. It is settled that, upon precisely such a state of facts, the drawer and indorser of a draft are not discharged. Johnson *v.* Bank of North America, 5 Robertson, 590; Smith *v.* Miller, 6 Robt. 157, 413; Turner *v.* Bank of Fox Lake, 3 Keyes, 425. Without a critical examination of earlier cases I propose to rest the decision of this case upon the authority of the case last cited. The facts of the two cases are as nearly alike as they can be, and the principle involved is precisely the same. The judgment must therefore be *Affirmed.*

Five judges for affirmance; two for reversal.

It will be noticed that the instrument drawn on Culver, Penn, & Co. is everywhere called a 'draft,' while that given by Culver, Penn, & Co. is uniformly called a 'cheque.' The inference must be that the first instrument and subject of the action was *not* a cheque; it must then have been a bill of exchange. Further, it is fair inference that the drawees of the first instrument, Culver, Penn, & Co., were bankers. The 'draft' was payable on demand; and notice of dishonor appears to have been treated as necessary.

We have here then, apparently, a bill of exchange — as distinguished from a cheque — drawn upon a banker, and payable on demand; but nothing was said upon the point, and the case therefore cannot be pressed very far as authority in that particular. See Bills and Notes (Students' Series), 294, note.

MINOT v. RUSS.

Supreme Court of Massachusetts, June, 1892. 156 Mass. 458.

If the drawer in his own behalf, or for his own benefit, gets his cheque certified and then delivers it to the payee, the drawer is not discharged; but if the payee or holder in his own behalf, or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged.

The case is stated in the opinion of the court.

FIELD, C. J., for the court. — The first case is an appeal from a judgment rendered by the Superior Court for the defendant, on his demurrer to the declaration. The defendant, on October 29, 1891, drew a cheque on the Maverick National Bank, payable to the order of the plaintiff, and, being informed by the plaintiff that the cheque must be certified by the bank before it would be received, the defendant on the same day presented the cheque to the bank for certification, and the bank certified it by writing on the face of the cheque the following: 'Maverick National Bank. Pay only through Clearing-House. J. W. Work, Cashier. A. C. J., Paying Teller.' After it was certified, the cheque was, on Saturday, October 31, 1891, delivered by the defendant to the plaintiffs, for a valuable consideration. The declaration alleges that the bank stopped payment on Monday morning, November 2, 1891, 'before the commencement of business hours on said day,' and that on that day payment was duly demanded of the bank, and notice of non-payment was duly given to the defendant.

The second case is an appeal from a judgment rendered for the defendants by the Superior Court, on an agreed statement of facts. On Saturday, October 31, 1891, the defendants drew their cheque on the Maverick National Bank, payable to the order of the plaintiffs, and delivered it to them in payment of stocks bought by the defendants of the plaintiffs. The cheque was received too late to be deposited by the plaintiffs for collection in season to be

carried to the clearing-house on that day, but during banking hours on that day the plaintiffs presented the cheque to the Maverick National Bank for certification, and the bank certified it by writing or stamping on its face the following: 'Maverick National Bank. Certified. Pay only through Clearing-House. C. C. Domett, A. Cashier. ——, Paying Teller.'

At that time the defendants had on deposit sufficient funds to pay the cheque, and the bank on certification charged to the defendant's account the amount of the cheque, and credited it to a ledger account called certified cheques, in accordance with their uniform custom. After certification, the plaintiffs, on the same day, deposited the cheque in the Hamilton National Bank for collection. It is agreed that if the cheque had been presented for payment on Saturday, in banking hours, it would have been paid; but the Maverick National Bank transacted no business after Saturday, and on Sunday the Comptroller of the Currency placed a national bank examiner in charge, and the bank was put into the hands of a receiver. The clearing-house on November 2 refused to receive cheques on the Maverick National Bank, and the cheque was on that day duly presented for payment, and due notice of non-payment was given to the defendants.

Each of the cheques was in the ordinary form of cheques on a bank, and was payable on demand, and no presentment for acceptance or certification was necessary. In a sense, undoubtedly, a cheque is a species of bill of exchange, and in a sense also it is a distinct commercial instrument; but according to the general understanding of merchants, and according to our statutes, these instruments were cheques, and not bills of exchange. 'A cheque is an order to pay the holder a sum of money at the bank, on presentment of the cheque and demand of the money; no previous notice is necessary, no acceptance is required or expected, it has no days of grace. It is payable on presentment and not before.' Bullard *v.* Randall, 1 Gray, 605, 606. The duty of

the bank was to pay these cheques when they were presented for payment, if the drawers had sufficient funds on deposit. The bank owed no duty to the drawers to certify the cheques, although it could certify them if it saw fit, at the request of either the drawers or the holders, and if it certified them it became bound directly to the holders, or to the persons who should become the holders. In either case, the bank would charge to the account of the drawer the amount of the cheque, because by certification it had become absolutely liable to pay the cheque when presented. When a cheque payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation. But when the payee or holder of a cheque presents it for certification, the bank knows that this is done for the convenience or security of the holder. The holder could demand payment if he chose, and it is only because, instead of payment, the holder desires certification, that the bank certifies the cheque instead of paying it. In one case the bank certifies the cheque for the use or convenience of the drawer, and in the other for the use or convenience of the holder. In the present cases the checks were seasonably presented to the bank for payment, and on the facts stated the defendants would be liable unless the certification discharged them from liability.

It is argued that the certification of a cheque, whereby the bank becomes absolutely liable to pay it at any time on demand, discharges the drawer, because it is said that the cheque then becomes in effect a certificate of deposit; and it is also argued that the certification is in effect only an acceptance of a bill of exchange, and that if payment is duly demanded of the bank and refused, and notice of non-payment duly given, the drawer is held. So far as the question has been considered, it has been decided that the certification of a bank cheque is not, in all respects, like the making of a

certificate of deposit, or the acceptance of a bill of exchange, but that it is a thing sui generis, and that the effect of it depends upon the person who, in his own behalf, or for his own benefit, induces the bank to certify the cheque. The weight of authority is, that if the drawer in his own behalf, or for his own benefit, gets his cheque certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder, in his own behalf or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged. Born *v.* First National Bank, 123 Ind. 78; Rounds *v.* Smith, 42 Ill. 245; Brown *v.* Leckie, 43 Ill. 497; Andrews *v.* German National Bank, 9 Heisk. 211; First National Bank *v.* Leach, 52 N. Y. 350; Boyd *v.* Nasmith, 17 Ont. 40; Essex County National Bank *v.* Bank of Montreal, 7 Biss. 193; First National Bank *v.* Whitman, 94 U. S. 343, 345; Metropolitan National Bank *v.* Jones, 27 N. E. Rep. 533; Continental National Bank *v.* Cornhauser, 37 Ill. App. 475; National Commercial Bank *v.* Miller, 77 Ala. 168; Larsen v. Breene, 12 Col. 480; Mutual National Bank *v.* Rotge, 28 La. An. 933; Morse on Banking, §§ 414, 415. We are of opinion that this view of the law rests on sound reasons. If it be true that the existing methods of doing business make the use of certified cheques necessary, the persons who receive them can always require them to be certified before delivery. If they receive them uncertified and then present them to the bank for certification instead of payment, the certification should be considered as discharging the drawer.

It may also be said, that in the second case the certification amounted to an extension of the time of payment at the request of the payees, without the consent of the drawers. Before the certification the drawers could have requested the payees to present the cheque for payment on Saturday, or could themselves have drawn out the money and paid the cheque. After certification the amount of the cheque no longer stood to the credit of the drawers, and the payees had accepted an obligation of the bank to pay only through

the clearing-house, which could not happen before the following Monday. The result is that in the first case the judgment is reversed, and the demurrer overruled, and in the second case the judgment is affirmed.

WHISTLER *v.* FORSTER.

Common Pleas of England, Easter, 1863. 14 C. B. N. S. 248.

One who receives, though for value, an *unindorsed* cheque payable to order, takes it with no better rights than the prior holder had.

Action by indorsee against the drawer of a cheque, payable to A. S. Griffiths & Co., or order, and indorsed by the payees to the plaintiff.

The defendant traversed the drawing and indorsement of the cheque, and also pleaded that he was induced to draw it by and through the fraud of Griffiths & Co., and that there never was any value or consideration for the indorsement to the plaintiff or for the plaintiff's holding of it, and that he had notice of the premises before and when the cheque was first indorsed to him, and took the same from Griffiths & Co. with such notice. Issue thereon.

The following facts appeared on the trial: The cheque in question, which bore a 1*d.* stamp, was drawn by the defendant some day before the 3d of October, 1862, and handed by him to Griffiths upon an understanding that it was not to be presented for payment until the 4th, and an undertaking by Griffiths to furnish the defendant with funds to meet it early on the morning of that day, which, however, he failed to perform. Griffiths on the 3d gave the cheque to the plaintiff for value, but did not then indorse it. At the time he received the cheque he had no notice, apart from the want of indorsement to him, of the way in which Griffiths had obtained it from the defendant, but before he obtained the indorsement he had notice of the facts.

On the part of the defendant it was submitted that the plaintiff could not recover upon the cheque, first, because it was post-dated, and, secondly, because before he obtained Griffiths' indorsement he had notice of the fraud practised by Griffiths upon the defendant.

The learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him if the court should be of opinion that the cheque, though post-dated and unstamped (otherwise than with the penny stamp imposed by 21 & 22 Vict. c. 20, § 1), was a valid instrument, and that the plaintiff had a sufficient interest in the cheque to entitle him to sue upon it before he received information of the alleged fraud. Rule nisi obtained.

ERLE, C. J. — This is an action against the drawer of a bill of exchange; for though in form a cheque, the instrument is for all the purposes of the Stamp Act a bill. The plea is that the bill was obtained from the defendant by one Griffiths by means of fraud, and that it was indorsed to the plaintiff after he had notice of the fraud. The facts are shortly these: The instrument was a negotiable instrument which had been fraudulently obtained from the defendant by Griffiths and had been handed over by Griffiths to the plaintiff in part satisfaction of debt of a larger amount. But Griffiths, at the time he so handed over the bill to the plaintiff, omitted to indorse it. Under these circumstances the condition of things was this, that the plaintiff had at that time the same rights as if an ordinary chattel had passed to him by an equitable assignment; he would have all the rights which Griffiths could convey to him. Now, Griffiths having defrauded the defendant of the bill, he could pass no right by merely handing over the bill to another. According to the law merchant, the title to a negotiable instrument passes by indorsement and delivery. A title so acquired is good against all the world, provided the instrument is taken for value and without notice of any

fraud.[1] The plaintiff's title under the equitable assignment here therefore was to be rendered valid by indorsement; but at the time he obtained the indorsement he had notice that the bill had been fraudulently obtained by Griffiths from the defendant and that Griffiths had no right to make the indorsement. Assuming therefore that there may be conflicting equities between the plaintiff and the defendant, I think the right should prevail according to the rule of law, and that the plaintiff had no title as transferee of the bill at all.

Then as to the stamp . . . [Properly stamped.]

WILLES, J. — I concur with my lord as to both points. . . . [Properly stamped.]

As to the second point, the general rule of law is undoubted, that no one can transfer a better title than he himself possesses; nemo dat quod non habet. To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These, being part of the currency, are subject to the same rule as money; and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favor transfers in the ordinary and usual manner whereby a title is acquired according to the law merchant, and not to a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action, now indeed recognized and in many instances enforced by courts of law; and it is therefore clear that, in order to acquire the benefit of this rule, the holder of the bill must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud before he does so. Until he does so, he is merely in the position of the assignee of an ordinary chose in action, and has no better right than his assignor.

[1] Or other equity.

When he does so, he is affected by fraud which he knew of before the indorsement.

KEATING, J. — I am of the same opinion. The cheque in question, being payable to order, was properly stamped for the purpose of being admissible in evidence. . . . As to the other point, I think the plea was made out. The plaintiff sues as indorsee of the bill in question. The plea in substance is, that the defendant was defrauded of it by the person to whose order it is made payable, and that the plaintiff had notice of that fact before the instrument was indorsed to him. The question is, when was the bill indorsed to the plaintiff? It must be recollected that the plaintiff is suing in a court of law, and that the right to sue in a court of law upon a negotiable instrument is not complete without a written indorsement. Now, before the plaintiff's right to sue was rendered complete by a written indorsement, he had notice of the fraud. The subsequent indorsement therefore transferred no title to sue. The rule must be discharged.

Rule discharged.

The 'notice' of the fraud in this case is evidently information of it. The indorsement had been made, it seems, before the cheque became overdue. That the plaintiff could not have recovered though he had not obtained information of the fraud is clear, if the indorsement had been after maturity. See Lancaster Bank *v.* Taylor, 100 Mass. 18; Bills and Notes (Students' Series), p. 62. According to the case cited, indorsement after maturity would have been no better than taking after maturity. But see Beard *v.* Dedolph, 29 Wis. 136. On the other hand, indorsement before the cheque became overdue, though after it was taken, would have given the plaintiff a perfect title had he not meantime received information of the fraud.

BROWN *v.* THE BUTCHERS' AND DROVERS' BANK.

Supreme Court of New York, May, 1844. 6 Hill, 443.

The figures '1, 2, 8,' written upon a bill of exchange, constitute an indorsement, if so intended.

Writ of error. Brown, the defendant below, was sued as indorser of a bill of exchange, upon which were the figures '1, 2, 8,' in pencil. There was evidence strongly tending to show that the figures were in Brown's hand, and that he intended thereby to bind himself as an indorser; though it was also proved that he could write. The judge charged that if this evidence was believed, the jury must find for the plaintiff. The defendant excepted. Verdict and judgment for the plaintiff.

NELSON, C. J., for the court. — It has been expressly decided that an indorsement written in pencil is sufficient. Geary *v.* Physic, 5 Barn. & Cress. 234; and also that it may be made by a mark. George *v.* Surrey, Mood. & Malk. 516. In a recent case in the King's Bench, it was held that a mark was a good signing within the Statute of Frauds; and the court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference. Baker *v.* Denning, 8 Adol. & Ellis, 94. And see Harrison *v.* Harrison, 8 Ves. 185; Addy *v.* Grix, 8 id. 54.

These cases fully sustain the ruling of the court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend it to bind himself.

Judgment affirmed.

CRIST *v.* CRIST.

Supreme Court of Indiana, November, 1849. 1 Carter, 570.

Until the executor consents to the bequest by the testator of a promissory note to A, A has no legal title to the note, and the executor may sue upon it.[1]

BLACKFORD, J., for the court. — This was an action of debt brought by James W. Crist, executor of George W. Crist, deceased, against Christian Crist.

The suit is founded on two sealed notes for the payment of money, executed in December, 1839, by the defendant, and payable to the testator. There are two special pleas, to which replications were filed. The replications were demurred to generally, and judgment was rendered for the plaintiff. It is not deemed necessary to set out the pleadings at length. Taking the allegations in the replications to be true, which we must do, the facts may be considered to be as follows: —

In 1836 George W. Crist, being the owner in fee of a certain quarter-section of land, made his will, and devised the east half of said quarter-section to his son, Resin Crist. The defendant afterwards purchased of Resin Crist the interest which the latter claimed in the land under the will, and gave his notes for the price; but there does not appear to have been any written evidence of such purchase. After that purchase, namely, in 1839, George W. Crist, the devisor, sold said east half of said quarter-section of land to the defendant, and conveyed the same to him in fee, receiving in payment from the defendant the notes now sued on, together with a mortgage on the land to secure the purchase money. Resin Crist, who died before his father, left an infant son named William as his heir,

[1] It follows, as indorsement is necessary where the paper is payable to the order of the decedent, that there must be indorsement by the personal representative to the legatee, the point to be specially illustrated here. See Bills and Notes (Students' Series), p. 63.

who is now living. George W. Crist died on the 27th of March, 1844, without having altered his will, the Revised Statutes of 1843 being then in force.

The grounds relied on to defeat this suit were stated by the defendant's counsel, in their brief, to be as follows: 'First, these notes, or the proceeds of the sale, belong to William Crist, the infant son of Resin. Secondly, the action should have been in the name of the infant.'

We agree with the defendant that the legacy of the notes and mortgage, if there be such a legacy, did not lapse by the death of Resin Crist in the lifetime of his father. By virtue of the statute the legacy, if any, passed to William Crist, the infant son and heir of Resin, as it would have passed to Resin himself had he survived the testator. R. S. 1843, p. 489, § 23. But whether there is in fact any such legacy is another question. Previously to the Revised Statutes of 1843 the testator's sale and conveyance in fee to the defendant of the land, and his taking of a mortgage on the land to secure the price, after the execution of the will, would have been a revocation of the will as to said land. Adams *v.* Winne, 7 Paige, 97 (1). The defendant contends, however, that this rule is so changed by the 17th sec. of chap. 30 of the R. S. of 1843, that the notes and mortgage in question are now to be considered, under the circumstances of this case, as specifically bequeathed by the will. Whether this position of the defendant is correct or not we shall not stop to inquire. Admitting, for the sake of the argument, that William Crist is the specific legatee of the notes and mortgage, that specific bequest is not sufficient, of itself, to defeat the present action.

It was the executor's duty, by statute, to inventory, among other things, all bonds, mortgages, notes, and other securities for the payment of money. R. S. 1843, p. 515. There is also the following statutory provision: 'When any mortgagee of real estate, or any assignee of such mortgagee, shall die without having foreclosed the right of

redemption, or recovered payment of the amount secured by such mortgage, the mortgaged premises, and the debt secured thereby, shall be considered as personal assets in the hands of his executor or administrator, and shall be administered and accounted for as such; and such executor or administrator, as such, shall have the same right to possession of the mortgaged premises, and to bring any suit or action respecting the same, or for the recovery of the debt secured thereby, and to execute, discharge, or perform any duty, act, or power contained in such mortgage, or in the provisions of any law, as such mortgagee or assignee could if he were alive.' R. S. 1843, p. 572.

There can be no doubt, therefore, but that the notes and mortgage before us, supposed by the defendant to be specifically bequeathed, are part of the personal estate of the testator.

It is well settled that before any legatee of personal property is entitled to his legacy, he must have the assent to it of the executor. The doctrine is thus stated: 'The whole personal property of the testator devolves upon his executor. It is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors for the satisfaction of their demands, to the extent of the whole estate, without regard to the testator's having, by the will, directed that a portion of it shall be applied to other purposes. Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect. Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator by his will expressly direct that he shall do so; for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors. It follows from the rule respecting the necessity of the executor's assent, that if, without it, the legatee takes

possession of the thing bequeathed, the executor may maintain an action of trespass or trover against him; so, although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of the debts, he has no right to retain it in opposition to the executor; by whom, in such case, an action will lie to recover it.' 2 Williams on Executors, 982, 983.

If the executor refuse his consent to a legacy without cause, the legatee is entitled to relief in equity. Id. 984; 1 Roper on Leg. 573.

The following is a late case on this subject: A testator bequeathed to his two sons his two carriage manufactories, with all fixtures, implements, tools, *stock*, job-carriages, harness, and everything appertaining to his trade in the said manufactories. At the time of the testator's death a carriage was in one of the manufactories unfinished, which was being built to the order of the purchaser. A question arose between the executors and the sons, whether this carriage fell within the above bequest; and the executors paid the legacy duty on the whole, but annexed the following memorandum to the legacy receipt: 'A disagreement arising between the sons S and T and the executors, as to whether the whole of this item belongs to the said sons, or part of the residue, the executors desire to pay the duty on the whole, leaving it for them to settle with the legatees the proportion of duty, when the matter in dispute shall be determined.' The sons retained possession, and finished the carriage, delivered it to the purchaser, and received the price. The executors thereupon brought an action against the sons for money had and received; and the action was sustained, on the ground that the executors had not assented to the legacy. Lord Abinger said: 'I see no evidence of assent to the taking of this particular chattel by the defendants. Putting the case in the strongest way for them, that the executors had assented to the bequest of the stock, they yet expressly withheld

their assent as to this carriage, supposing that it did not form part of the stock in trade, or at least wishing for time to make up their minds whether it came within that description of property or not. And we have no right to consider whether they were right in thus withholding their assent or not. That is a question for the consideration of a court of equity, on a bill filed; but the legatee can maintain no action at law until the executor has assented to the bequest. Here, for some reason good or bad, it appears that the executors had withheld their assent; and they had a right to do so until compelled by a competent authority.' Elliott *v.* Elliott, 9 Mees. & Welsb. 23.

It does not appear in the case before us that any assent was ever expressly given by the executor to the legacy in question; nor are there any facts stated from which an assent can be presumed.

This is a suit by an executor on notes given by the defendant to the testator, the notes being secured by a mortgage on real estate. The defence is, that the notes and mortgage were specifically bequeathed to one William Crist, in whose name the suit should have been brought. We have shown that the notes and mortgage are part of the personal estate of the testator, and that, supposing them to have been specifically bequeathed by him, they cannot be said to be the property of the legatee until the executor shall have consented to the legacy. No such assent being shown, the defence must fail.

A debtor to an estate, where the debt has been specifically bequeathed by the testator, cannot, before the executor has assented to the legacy, say to the latter, 'I will not pay you.' Bank of England *v.* Parsons, 5 Ves. 665.

Whether, if the executor had assented to the legacy, the suit on the notes should not still be in his name, we have not examined.

Per curiam: The judgment is

Affirmed with costs.

SHAW v. KNOX.

Supreme Court of Massachusetts, November, 1867. 98 Mass. 214.

One who indorses a draft for the accommodation of the drawer, and at the request of another who also indorses it at the same time and for the same purpose, does not thereby become a joint indorser with him.

An accommodation indorser of a draft who has been obliged to pay it to a holder for value may maintain an action thereon against a prior indorser.

Contract on a draft by Nathaniel Heath on John W. West for payment of $450, three months after date to the order of the defendant, indorsed by the latter and bearing also, below the defendant's indorsement, the indorsement of E. Longfellow & Son.

Trial in the Superior Court, without a jury, when it appeared that the draft was drawn on the day of its date, and indorsed by the defendant, and then at his request by E. Longfellow & Son, 'so that it could be discounted' (neither of the indorsers receiving any consideration therefor), and then was negotiated, and discounted by a bank, and presented for acceptance; that it was accepted by West, but on maturity was protested for non-payment; and that E. Longfellow & Son some months later paid it to the bank and took it up, and afterwards sold it to the plaintiff.

The defendant asked the judge to rule 'that E. Longfellow & Son and the defendant were joint accommodation indorsers, and, when the former paid the draft, its negotiability was destroyed, and they could not pass it to the plaintiff so that he could maintain an action thereon.' But he declined so to rule, and ruled that the plaintiff could maintain his action, and found for the plaintiff; and the defendant alleged exceptions.

Bigelow, C. J., for the court.—There was no joint liability on the part of the defendant with the subsequent indorsers. The indorsers on the draft were all liable to the holders of

the draft for value on their several contracts of indorsement. There was no agreement between the parties, when the draft was made and indorsed, that they should hold any other relation towards each other than that which would result from their being successive indorsers on the draft for the accommodation of the drawer. If the last indorser paid the draft to the holder for value, he would succeed to the right of such holder, and could look to his prior indorser for payment of the amount paid by him. Guild *v.* Eager, 17 Mass. 615. Such payment was in fact made by the second indorsers, from whom the plaintiff derives his title to the draft. The relations of the parties to the draft can in no sense be regarded as creating a contract of joint guaranty and suretyship. The rights and duties of the several parties to an accommodation note or bill of exchange are the same in all respects as upon notes given for value. The legal effect of the contract into which they respectively enter by becoming parties to negotiable paper is that which appears on the face of the bill or note. It follows that, if an accommodation indorser is obliged to take up the draft in the hands of a holder for value, he can look to his prior indorser for payment. Church *v.* Barlow, 9 Pick. 547; Clapp *v.* Rice, 13 Gray, 403; Howe *v.* Merrill, 5 Cush. 80.

Exceptions overruled.

DALE *v.* GEAR.

Supreme Court of Connecticut, February, 1871. 38 Conn. 15.

Parol evidence is not admissible to show that an indorsement in blank of a negotiable promissory note was by agreement of the parties to be taken as an indorsement without recourse, if no agency, trust, or antecedent equity existed between the parties.

Assumpsit by the holder against the indorser in blank of a promissory note. Plea, that in consideration of the defendant's agreement 'to indorse said note in blank, and

to omit prefixing the words "without recourse" to his said indorsement, they, the said plaintiffs, by parol, then and there promised and agreed that they never would have recourse to the said defendant upon said note or upon said indorsement.' Demurrer to the plea, and case reserved thereon for the Supreme Court.

BUTLER, C. J., for the court. — We have given this case the consideration which, as involving an important commercial question, it has seemed to require, and are of opinion that the plea cannot be sustained on principle or by authority.

First, it is not sustainable on principle.

The rule that parol evidence is not admissible to contradict or vary a written contract is founded in the highest principles of public policy, and there is no class of contracts to which it should be more inflexibly applied than to those connected with bills of exchange and promissory notes. Nor is there any one of the varied and special contracts, so connected, in respect to which the application of the rule is more important than the contract of warranty implied by law from the blank indorsement of a negotiable note by the payee before maturity. It is absolutely essential to the negotiability of such a note that the rule to which we have alluded should be applied to it; and it has always been so applied when the note has been negotiated to a second indorsee and an effort has been made to prove some contemporaneous parol agreement in bar.

But it has sometimes been claimed, and is claimed in support of the plea in this case, that notwithstanding the rule is so applied in favor of a bona fide holder to whom the note has been negotiated, yet as between the indorser and indorsee, the original parties to the contract of indorsement, the rule should not be applied. But the answer must be, that the contract of indorsement is implied by law as clearly and perfectly from the blank indorsement of a negotiable note, irrespective of any contingency of

redemption, or recovered payment of the amount secured by such mortgage, the mortgaged premises, and the debt secured thereby, shall be considered as personal assets in the hands of his executor or administrator, and shall be administered and accounted for as such; and such executor or administrator, as such, shall have the same right to possession of the mortgaged premises, and to bring any suit or action respecting the same, or for the recovery of the debt secured thereby, and to execute, discharge, or perform any duty, act, or power contained in such mortgage, or in the provisions of any law, as such mortgagee or assignee could if he were alive.' R. S. 1843, p. 572.

There can be no doubt, therefore, but that the notes and mortgage before us, supposed by the defendant to be specifically bequeathed, are part of the personal estate of the testator.

It is well settled that before any legatee of personal property is entitled to his legacy, he must have the assent to it of the executor. The doctrine is thus stated: 'The whole personal property of the testator devolves upon his executor. It is his duty to apply it, in the first place, to the payment of the debts of the deceased; and he is responsible to the creditors for the satisfaction of their demands, to the extent of the whole estate, without regard to the testator's having, by the will, directed that a portion of it shall be applied to other purposes. Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect. Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator by his will expressly direct that he shall do so; for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors. It follows from the rule respecting the necessity of the executor's assent, that if, without it, the legatee takes

possession of the thing bequeathed, the executor may maintain an action of trespass or trover against him; so, although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of the debts, he has no right to retain it in opposition to the executor; by whom, in such case, an action will lie to recover it.' 2 Williams on Executors, 982, 983.

If the executor refuse his consent to a legacy without cause, the legatee is entitled to relief in equity. Id. 984; 1 Roper on Leg. 573.

The following is a late case on this subject: A testator bequeathed to his two sons his two carriage manufactories, with all fixtures, implements, tools, *stock*, job-carriages, harness, and everything appertaining to his trade in the said manufactories. At the time of the testator's death a carriage was in one of the manufactories unfinished, which was being built to the order of the purchaser. A question arose between the executors and the sons, whether this carriage fell within the above bequest; and the executors paid the legacy duty on the whole, but annexed the following memorandum to the legacy receipt: 'A disagreement arising between the sons S and T and the executors, as to whether the whole of this item belongs to the said sons, or part of the residue, the executors desire to pay the duty on the whole, leaving it for them to settle with the legatees the proportion of duty, when the matter in dispute shall be determined.' The sons retained possession, and finished the carriage, delivered it to the purchaser, and received the price. The executors thereupon brought an action against the sons for money had and received; and the action was sustained, on the ground that the executors had not assented to the legacy. Lord Abinger said: 'I see no evidence of assent to the taking of this particular chattel by the defendants. Putting the case in the strongest way for them, that the executors had assented to the bequest of the stock, they yet expressly withheld

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dence would be received in chancery to reach such a fraud, and therefore would be received in their courts at law; that the relief in equity would be grounded, not upon the admissibility of parol evidence as between such parties to contradict the writing, but to show extrinsic facts raising an equity dehors the instrument, to prevent the fraudulent purpose. The court also say that the evidence was admissible to show a *trust* between Hill and Ely for the purpose of collecting the notes and applying the proceeds in payment for the coffee. They recognize the leading case of Hoare *v.* Graham, 3 Camp. 57, as law, but distinguish it because in Hoare *v.* Graham there was no allegation of fraud. The case is on all fours with Downer *v.* Cheseborough. In both there was an antecedent contract which raised an equity dehors the instrument, which made the attempt to enforce the contract implied by law from the indorsement a fraudulent one relievable in equity. It is implied in both decisions that in a case like this, where no equity existed, such a contract could not be shown by parol.

Hill *v.* Ely was not overruled or shaken by the subsequent cases cited. Patterson *v.* Todd, 18 Penn. St. 426, was the case of a negotiable note, but it was indorsed by the payee when *overdue*, and there was no subsequent demand and notice. The main question in the case was whether such a demand should have been made upon the maker and notice given to the indorser. It was held that the indorsement was equivalent to drawing a new bill, and that demand should have been made in a reasonable time and notice given of the dishonor. The court also held that under the circumstances of that case the defendant might show by parol evidence that he said he would not warrant the notes. But the court did not question the authority of Hill *v.* Ely, nor does it appear that it has ever been questioned. The remaining case cited from Pennsylvania was the case of a non-negotiable note. It has no bearing upon this case.

The defendant under his third point cites a case from

Massachusetts, and dicta from Judge Shaw.[1] But the note in that case was not negotiable, and the case and dicta are unimportant. The defendant also cites one English case — that of Pike *v.* Street, Moody & Malkin, 227 — in support of his claim. It is sufficient to say of that case that it is not directly upon the point, is contrary to the present current of English decisions, and was questioned in the recent case of Foster *v.* Jolly, 1 Cromp. Mees. & R. 703.

These are all the decisions cited by the defendant; and there is not one of them directly in point which can be relied upon as authority. On the other hand, the current of decisions in England is directly against the admission of such evidence. Hoare *v.* Graham, 3 Camp. 57; Goupy *v.* Hardy, 7 Taunt. 159; Free *v.* Hawkins, 8 Taunt. 92. And the adverse decisions in this country, which are directly in point, are quite numerous. Bank of Albion *v.* Smith, 27 Barb. 489; Thompson *v.* Ketcham, 8 Johns. 146; Patterson *v.* Hull, 9 Cowen, 747; Payne *v.* Ladue, 1 Hill, 116; Hall *v.* Newcombe, 7 Hill, 416; Odam *v.* Beard, 1 Blackf. 191; Fuller *v.* McDonald, 8 Greenl. 213; Crocker *v.* Gretchel, 23 Maine, 392; Wilson *v.* Black, 6 Blackf. 509; Barry *v.* Morse, 3 N. H. 132.

The Superior Court[2] must therefore be advised that the plea is insufficient.

THE STATE BANK *v.* FEARING.

Supreme Court of Massachusetts, March, 1835. 16 Pick. 533.

A bank is entitled to recover against the second indorser of a note discounted by the bank, although the indorsement of the name of the payee is a forgery, and although the note was offered for discount by the maker and not by the second indorser.

Assumpsit on a promissory note for the sum of $2,000, dated April 15, 1833, payable to the order of Thomas Jack-

[1] Riley *v.* Gerrish, 9 Cush. 104.

[2] A slip for Court of Common Pleas.

son, junior, in six months, made by Charles Brown, and indorsed with the names of the payee and of the defendant.

By an agreed statement of facts, it appeared that the signatures of Brown and the defendant were genuine, but that the defendant could prove, if such evidence was admissible, that the indorsement of the name of the payee was a forgery; that the note was presented by Brown to the plaintiffs for discount, in the usual course of business, and discounted by them for him; that, at the time of such discount, the plaintiffs and the defendant were ignorant of the forgery; and that due notice of the non-payment of the note was given to Brown, Jackson, and the defendant.

If upon this statement of facts the court should be of opinion that the plaintiffs were entitled to judgment, the defendant was to be defaulted; otherwise, the plaintiffs were to be nonsuited.

SHAW, C. J., for the court. — The peculiar features of this action are, that the plaintiffs claim of the second indorser, from whom they immediately took the note. The question is, whether the forgery of the indorsement of the name of a prior party is a good defence to the note; and the court are of opinion that it is not.

In general it is not necessary for the holder to prove the signature of any party prior to the party whom he sues. The reason seems to be obvious, that the party defendant, by his indorsement, has admitted the ability and the signature of all prior parties. Bayley on Bills, 313; Critchlow *v.* Parry, 2 Camp. 182. The effect of the engagement of the indorser is, that if the prior parties do not pay the note according to its tenor upon due presentment, upon notice to him he will. It is therefore a rule upon this subject, that a plaintiff is under no obligation to prove the signature of those prior to the party intended to be charged. It is very different where he claims against the acceptor of a bill or maker of a note. They respectively promise to pay to the payee or his order, and until he has made such order by his

indorsement, the plaintiff can establish no title, and, to prove such order, he must prove the genuineness of his signature. Smith *v.* Chester, 1 T. R. 654; Lambert *v.* Pack, 1 Salk. 127. So an acceptor is bound, though the bill be forged. Jengs *v.* Fawler, 2 Strange, 946.

The circumstance that this bill was offered for discount by Brown makes no difference; the plaintiffs had a right to look to their immediate indorser, and if satisfied to take the note on his credit, he is liable to them; and it was for him to see that he has a good remedy over against those who purport to be prior parties.

Defendant defaulted.

ERWIN *v.* DOWNS.

Court of Appeals of New York, June, 1857. 15 N. Y. 575.

An indorsee of a promissory note may recover against an indorser, though the former took the note with knowledge that the maker was incompetent to contract.

Action upon two accommodation promissory notes jointly made by the same persons, each note payable to the defendant, and indorsed by him. The plaintiff took them for value before maturity. Defence that the makers were married women when they signed the notes, and incompetent to contract, and that the plaintiff knew the fact when he took the notes. There had been due demand and notice of dishonor. Judgment for the plaintiff on report of referee; the defendant appealed.

SHANKLAND, J., for the court. — The note was void, as against the makers, because they were married women, and incapable of contracting obligations in that form. But when the defendant indorsed the note, he impliedly contracted that the makers were competent to contract, and had legally contracted, the obligation of joint makers of the note. He also assumed the legal obligation, in most respects, of the drawers of a bill. The fact, known to the plaintiff at

the time he took the note, that the makers were married women, did not deprive him of the character of a bona fide purchaser; nor does the payee's knowledge that the drawee is a married woman discharge the drawer in case of non-payment of the bill by the drawee; nor is the indorser discharged, though the name of the maker is forged. 1 Comst. 113. The fact is not found that the plaintiff was aware the note was accommodation paper. The plaintiff was a bona fide purchaser within the law merchant. Neither the complaint nor the finding of the referee tells us who transferred the notes to the plaintiff. The legal presumption is, that he received them from some legal holder in due course of business. *Judgment affirmed.*

TOWNSEND *v.* BUSH.

Supreme Court of Connecticut, November, 1814. 1 Conn. 260.

A party to a negotiable instrument, who is divested of interest, is competent to prove usury in the inception of the paper.

Assumpsit against Bush as acceptor of a bill of exchange drawn by Ebenezer and Atwater Townsend, and payable to the plaintiffs or order. There was also a count for money paid, laid out, and expended for the defendant's use. Defence, usury. To prove this, the defendant offered the individuals composing the firm of E. & A. Townsend as witnesses; offering also, at the same time, to show that they had no interest in this suit, being discharged from all liability on the bill under an act of insolvency in the State of New York. The plaintiffs objected on the ground that said parties were drawers of the bill. The court excluded the witnesses, and directed the jury to find a verdict for the plaintiffs; which being accordingly done, the defendant moved for a new trial. The motion was reserved for the consideration of all the judges.

TRUMBULL, J., for the court. — The principal question in this case is, whether Ebenezer and Atwater Townsend, the

drawers of the bill in question, are admissible witnesses in an action by the plaintiffs as payees of the bill against the defendant as acceptor, to prove that it was executed on an usurious contract, and therefore is void in law.

The rule that no person can be permitted to give testimony to invalidate any instrument to which he has made himself a party by affixing his signature, in cases wherein he has no interest in the event of the suit on trial, was first adopted in the case of Walton *v.* Shelley, 1 Durn. & East, 296, by Lord Mansfield, and the other judges of the King's Bench. He states that 'the rule is founded in public policy; that there is a sound reason for it, because every man who is a party to an instrument gives a credit [to] it; that it is of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it; that it is emphatically right in case of notes, because, in consequence of different statutes, two very hard cases have arisen: first, with respect to a gaming note, which, though in possession of a bona fide purchaser without notice is void; and, in the case of usury, a note given for a usurious consideration, though in the hands of a fair indorsee, is equally void; and therefore, whenever a man signs these instruments, he is always understood to say that to his knowledge there is no legal objection to them whatever.' He then quotes the maxim of the civil law, nemo suam allegans turpitudinem est audiendus, and applies it as conclusive on the present point. The other judges concurred, and established this as a general rule of law.

The English courts soon found the principle was laid down on too broad a scale, and narrowed it in its application to negotiable instruments only. No new or additional reasons were ever adduced in its support. It was adhered to on the grounds stated by Lord Mansfield, and the authority of the decision in that case. But, at length, the rule was exploded in the King's Bench, and such a witness determined to be admissible, unless interested in the event of

the suit on trial. See Jordaine *v.* Lashbrooke, 7 Durn. & East, 601.

As the decisions of the highest court and ablest judges at Westminster Hall have been thus directly contradictory, and as their principle (notwithstanding the dicta of several of the judges in Allen *v.* Holkins, 1 Day's Cases in Error, p. 17, adopting the rule as sound law, and the decision in Webb *v.* Danforth, p. 301, denying its application as to facts subsequent to the execution of the instrument) has never till now come directly in question before the highest courts in this State, it is our duty to decide it according to the general rules and principles of law respecting admissibility of testimony; and if the grounds and reasons in Walton *v.* Shelley are found to be fallacious, we cannot consider the case and its authority conclusive.

The first ground Lord Mansfield takes is, that every person who signs an instrument thereby gives it a credit, and can never be admitted to dispute its validity. Before we adopt this principle of universal exclusion and estoppel, we must inquire what credit each several party, by putting his signature upon a negotiable instrument, thereby gives to it, and what obligation he thereby incurs; for each signer stands on a different ground.

The drawer of a bill or negotiable note acknowledges himself indebted to the payee to the amount of the sum it contains, and engages to pay the damages, in case the bill shall be dishonored, or the note uncollected, without the fault of the payee or of those to whom it may be indorsed. The indorser of a bill or note acknowledges his receipt of a valuable consideration, and contracts to pay the sum, in case it cannot be obtained of the drawer. The acceptor acknowledges it to be duly drawn; he is not admitted to deny the handwriting of the drawer; and he contracts to pay the sum according to its contents to the legal holder.

These are the rules and principles of common law as adopted and sanctioned by the courts in this State.

The indorsee or holder of a negotiable security has noth-

ing to do with the transaction between the original parties. See Jordaine *v.* Lashbrooke. Nor has the drawer or acceptor anything more to do with the contracts between subsequent indorsers and indorsees. Each party is bound only so far as his own obligation extends, and cannot be precluded from denying any fact not acknowledged by his signature. All these contracts are separate and independent. No party by his signature warrants the validity of any contract but his own, or gives any further credit to the security, or is interested in the event of any suit on the several contracts of other parties, whose names may appear on the instrument. He warrants nothing further with respect to the validity of the draft, he hangs out no false colors, and is not estopped by his signature from testifying to any facts respecting the instrument, or any legal objections within his knowledge.

The only fundamental principle of the common law applicable to the present question is this, that no man can be a witness in his own cause; and this rule hath ever been considered as applicable to every case in which he is a party, or is interested, and to no others. It was formerly holden as well in the English courts as our own, that an interest in the question was a sufficient ground for excluding a witness. It is now settled law in both, that an interest in the event of the suit is the only ground on which he can be rejected; and that a mere interest in the question does not affect his competency, but his credit with the jury only. But this distinction was not fully settled at the time the case of Walton *v.* Shelley was tried. Justice Buller, though he concurred in the principle that no man can invalidate his own security, relied much in his argument on the fact that the witness was interested in the question, because the question put to him was upon the validity of the notes he had indorsed; although he clearly was not interested in the event of the suit on trial, as it must be uncertain whether he would ever be subjected to a subsequent action on the instrument, was

already liable on his signature, and could never give the verdict in evidence in his favor.

The maxim of the civil law, that no man is to be heard who alleges his own turpitude or crime, was never by any court or judge, before Lord Mansfield, applied to the inadmissibility of a witness, but only to the rights of the parties in a suit or action. No suitor can support a claim in which the ground or consideration is an unlawful act of his own ; nor can any defendant be heard on a defence grounded on his own unlawful act. But an accomplice in a crime, a fraud, or any illegal transaction, was always an admissible witness, unless immediately interested in the suit. I may further observe that the term 'turpitude' can with no propriety be applied to an act not malum in se, but only malum prohibitum by force of some statute, making it penal in some particular country or jurisdiction.

In Jordaine *v.* Lashbrooke, Lord Kenyon says: 'The rule contended for is this: Whatever fraud may have been committed, if the party to the fraud can get on the instrument the name of the person who may be the only witness to the transaction, he will stand entrenched within the forms of law, and impose silence on that only witness, though he be a person of unimpeachable character, and not interested in the cause.' This he denies to be law. Grose, Justice, says: 'Let the plaintiff in this case resort to his indorser to recover back the consideration he gave for the bill.'

Indeed, if a man sell and indorse a note executed by an infant, or feme covert, and void at common law, or void by statute as being usurious, unstamped, or a forgery, I see no legal defence he can set up against an action of assumpsit by the indorser for the money paid on a consideration which has wholly failed. For that is not an action on the bill or note, but rests entirely on the ground that the note is void in law. If such an action can be supported, there is no hardship in the case of an innocent purchaser; he has his remedy. If in any case he is

deprived of every legal remedy, no court can have a right, in compassion to the hardship of his situation, to assist him in evading the law by excluding such witnesses or evidence as are admissible in all other cases.

The hardship upon the innocent indorsee, which seems so strongly to have influenced the mind of Lord Mansfield, is indeed no more than this: by the statutes to which he refers, all bills or notes, where the consideration is money lent on usury or for gaming, are declared void to all intents and purposes whatever; and, consequently, the indorsee, whenever he brings his suit on the note or bill itself against the drawer, promisor, or acceptor, must fail of a recovery in that action. But he is not without remedy; for, if a fair and bona fide purchaser without notice, he may recover of the indorser on his indorsement. Bowyer *v.* Bampton, 2 Stra. 1155.

In the case of Lowe and Others *v.* Waller, Doug. 736, in which all the former cases are well considered, Lord Mansfield himself says: 'It is better that the law should be as it is with respect to bills and notes than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover on the bill.' I am therefore of opinion that the witnesses offered are admissible, notwithstanding they have put their signature upon the bill.

SWIFT, J., delivered a concurring opinion.

MUSSON *v.* LAKE.

Supreme Court of the United States, December, 1845. 4 How. 262.

The notary should present the paper when he demands payment.

A protest which only states that payment was demanded is not evidence to prove presentment.

THE case is stated in the opinion of the court.

McKINLEY, J., for the court. — The plaintiffs brought an action of assumpsit, in the Circuit Court of the United States for the Southern District of Mississippi, against the defendant, as indorser of a bill of exchange, drawn at Vicksburg, in said State, by Steele, Jenkins, & Co., for $6,133, payable twelve months after the first day of February, 1837, to R. H. and J. H. Crump, and addressed to Kirkman, Rosser, & Co., at New Orleans, and by them afterwards accepted, and indorsed by the payees and the defendant.

On the trial of the cause, the plaintiffs offered to read as evidence to the jury a protest of the bill of exchange, to the reading of which the defendant objected; because it did not appear in the protest that the notary had presented the bill to the acceptors, or either of them, when he demanded payment thereof. And upon the question, whether the protest ought to be read to the jury as evidence of a presentment of the bill to the acceptors for payment, or as evidence of the dishonor of the bill, the judges were opposed in opinion: which division of opinion they ordered to be certified to this court; and upon that certificate the question is now before us for determination.

The indorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice to be given

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to the indorser, then he promises to pay it. All these conditions enter into and make part of the contract between these parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser of the bill. A presentment to and demand of payment must be made of the acceptor personally, at his place of business or his dwelling. Story, Bills, § 325. Bankruptcy, insolvency, or even the death of the acceptor will not excuse the neglect to make due presentment; and in the latter case it should be made to the personal representatives of the deceased. Chitty, Bills, 7th London ed. 246, 247; Story, Bills, 360; 5 Taunt. 30; 12 Wend. 439; 2 Douglass, 515; Warrington *v.* Furbor, 8 East, 242, 245; Esdaile *v.* Sowerby, 11 East, 117; 14 East, 500.

The reasons why presentment should be made to the drawee are, first, that he may judge of the genuineness of the bill; secondly, of the right of the holder to receive the contents; and, thirdly, that he may obtain immediate possession of the bill upon paying the amount. And the acceptor has a right to see that the person demanding payment has a right to receive it, before he is bound to answer whether he will pay it or not; for, notwithstanding his acceptance, it may have passed into other hands before its maturity. And he, as well as the drawee, has a right to the possession of the bill upon paying it, to be used as a voucher in the settlement of accounts with the drawer. Story, Bills, § 361; Hansard *v.* Robinson, 7 Barn. & C. 90.

Mr. Justice Story has given the form of a protest now in use in England, in his treatise on Bills of Exchange, by which it will be seen that the words 'did exhibit said bill' are used, and a blank is left to be filled up with 'the presentment, and to whom made, and the reason, if assigned, for non-payment.' Story, Bills, 302, note. This, with the authorities already referred to, shows that the protest should set forth the presentment of the bill, the demand

of payment, and the answer of the drawee or acceptor. The holder of the bill is the proper person to make the presentment of it for payment or acceptance. Story, Bills, § 360. But the law makes the notary his agent for the purpose of presenting the bill, and doing whatever the holder is bound to do to fix the liability of the indorser. Everything, therefore, that he does in the performance of this duty must appear distinctly in his protest. He is the officer of a foreign government; the proceeding is ex parte; and the evidence contained in the protest is credited in all foreign courts. Chitty, Bills, 215; Rogers *v.* Stevens, 2 T. R. 713; Brough *v.* Parkings, 2 Ld. Raym. 993; Orr *v.* Maginnis, 7 East, 359; Chesmer *v.* Noyes, 4 Camp. 129. The evidence contained in the protest must, therefore, stand or fall upon its own merits. It rests upon the same footing with parol evidence; and, if it fails to make full proof of due diligence on the part of the plaintiff, it must be rejected.

But the counsel for the plaintiffs insists that the statute of Louisiana and the interpretation given to it by the Supreme Court of that State in the case of Nott's Executor *v.* Beard, 16 La. 308, have so changed the law merchant as to render unnecessary the presentment of a foreign bill for payment. After a careful examination of the opinion of the court in that case, we are unable to perceive any intention manifested to depart from the settled usages of the law merchant; but, on the contrary, they attempt by argument and authority to bring the case within that law. The question before that court was the identical question now before us. The protest was objected to because it did not show that the bill had been presented by the notary to the acceptors for payment. To this objection, that court said it might perhaps have been more specific, if, in the protest, it had been stated that the bill was presented, and payment thereof demanded. And they admit the law is well settled, that, before the holder of an accepted bill can call on the drawer for payment he must make a pre-

sentment for, or demand of payment, and give notice of the refusal. Here, then, is a definite proposition, asserting that a presentment for payment and a demand of payment are convertible terms, and that the proof of either would be sufficient.

To support this proposition, they refer to Chitty on Bills, and Bayley on Bills, and the annotators on them. And as further proof and illustration, and to show that demand of payment should be preferred to presentment for payment, they refer to the statute of Louisiana, passed in 1827, in which they say the word 'demand' is used in it, and that the word 'presentment' is not; and they refer to the statute, also to show that notaries were vested with certain powers by it, which gave authority to their acts; and that they being public officers, the presumption of law is, that they do their duty; and therefore, if the protest were defective, and liable to the objection urged against it, this presumption of law would cover all such defects. This is substituting presumption for proof, in violation of all the rules of evidence.

With all due respect for that distinguished tribunal, we are constrained to dissent from the general proposition they have laid down on the subject of demand and presentment, and from all their reasoning in support of it. Due diligence is a question of law; and we think we have shown, by abundant authority, that the holder of an accepted bill, to fix the liability of the drawer or indorser, must present it to the acceptor and demand payment thereof. It may be well here to repeat what Lord Tenterden, C. J., said on this subject, in delivering the judgment of the Court of King's Bench, in the case of Hansard *v.* Robinson, before referred to. He said: 'The general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes in this case an exception to the general rule. What, then, is the custom in this respect? It is, that the holder of the

bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge pro tanto, in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?' This extract, we think, furnishes a full answer to all that has been said by the Supreme Court of Louisiana to prove that it is not necessary to present the bill to the acceptor for payment; and to the presumption of law relied on to cure the defects in the protest.

But to show that, by the statute of Louisiana, the presentment of a bill to the acceptor for payment is not dispensed with, and that the presentment is, by a fair construction of the act, as much within its true intent and meaning as the demand, we proceed to examine its provisions. The principal object of the legislature in passing this statute seems to have been to give authority to notaries to give notices, in all cases of protested bills and promissory notes; and to make their certificates evidence of such notices. And, therefore, all that is said on the subject of the demand and the manner of making it, and the other circumstances attending it, was not intended as a new enactment on these subjects, but as inducement to the powers conferred on the notary, which was the principal object of the statute, as will appear, we think, by reading it. That part of it which relates to this subject is in these words: 'That all notaries, and persons acting as such, are authorized, in their protests of bills of exchange, promissory notes, and orders for the payment of money, to make mention of the demand made upon the drawee, acceptor, or person on whom such order or bill of exchange is drawn or given, and of the manner and circumstances of such demand; and by certificate, added to

such protest, to state the manner in which any notices of protest to drawers, indorsers, or other persons interested were served or forwarded; and whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all the notices therein stated.'

It seems to have been taken for granted by the legislature that the notaries knew how to make out a protest, and therefore they did not prescribe the form, but gave the substance of it, to which the notary was required to add a certificate of the manner in which he had given notices; and when done, according to the statute, a certified copy of the protest and certificate should be evidence, not of the demand and manner and circumstances of the demand, but of the notice only. This shows that the intention of the legislature, in passing this part of the statute, was merely to authorize the notaries to give notices, and to make the copy of the protest, and the certificate added to it, evidence of notice in the courts of Louisiana. But, independent of this view of the subject, we think the language employed in this statute includes the presentment of the bill for payment, and for all other purposes, as fully as it does the demand of payment. In giving construction to the act, the phrase, 'and of the manner and circumstances of such demand,' cannot be rejected, but must receive a fair interpretation. When taken in connection with other parts of the statute, what do these words mean? The manner of making a demand of payment, we have seen, is by presenting the bill to the drawee or acceptor; and so important is this part of the proceeding, that the omission to present the bill to the acceptor will justify his refusal to pay it, although payment be demanded. The legislature cannot be presumed to have intended to make so important a change in the law merchant as that ascribed to them by the counsel for the plaintiffs, without at the same time providing some other mode of obtaining the acceptance and payment of bills of exchange, and of holding drawers and indorsers to their liabilities. It is but

reasonable, therefore, to give to the phrase before referred to such construction, if practicable, as will leave the law merchant as it stood before the passage of the statute, and carry into effect the main intention of the legislature. This, we think, may fairly be done without doing any violence to the intention or the language of the statute.

The manner of the demand must, therefore, mean the presentment of the bill for either acceptance or payment; and the circumstances of the demand, we think, means the place where the presentment and demand is made, and the person to whom or of whom it is made, and the answer made by such person. It is very clear, that bills payable at sight, and after sight, are within the meaning of the statute; because it provides for a demand of payment of the acceptor of a bill. Now, how can there be an acceptor of a bill, without a presentment for acceptance? Until the bill become due, payment cannot be demanded of the drawee. This shows that, without the word 'presentment' and the word 'demand' also, the plain meaning of the statute could not be carried into effect. A bill payable at a fixed period after its date need not be presented for acceptance: it is sufficient to present it and demand payment when it arrives at maturity; but a bill payable at sight, or after sight, can never become due until after it has been accepted. How is the holder or the notary to obtain the acceptance of such a bill, under the decision of the Supreme Court of Louisiana? Will it be sufficient to demand payment of the bill? That would be a nugatory act, because it is not due; then it must be admitted that, by fair and necessary construction, the word 'presentment' is within the plain meaning and intention of the statute, and that the bill may be presented for acceptance or for payment, and therefore neither the statute nor the decision of the Supreme Court of Louisiana has changed the law merchant in any of these respects.

There is, however, another question, entirely independent of the statute and the decision of the Supreme Court

of Louisiana, which may be decisive of the case before this court; and that question is, whether the contract between the holder and indorser of the bill in controversy is to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was drawn and indorsed. The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it. The acceptors resided at New Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the law of Louisiana. But the drawers and indorsers resided in Mississippi; the bill was drawn and indorsed there; and their liabilities, if any, accrued there. The undertaking of the defendant was, as before stated, that the drawers should pay the bill; and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought, and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must, therefore, be governed by the laws of the latter State. Story, Bills, § 366; 4 Peters, 123; 2 Kent, Comm. 459; 13 Mass. 4; 12 Wend. 439; Story, Bills, § 76; 4 Johns. 119; 12 Johns. 142; 5 East, 124; 3 Mass. 81; 3 Cowen, 154; 1 Cowen, 107; 5 Cranch, 298.

Whatever, therefore, may have been the intention of the legislature in passing the statute, and of the Supreme Court of Louisiana in the decision of the case referred to, neither can affect, in the slightest degree, the case before us. In Mississippi, the custom of merchants has been adopted as part of the common law; and by that law and their statute law this case must be governed. We think, therefore, the protest offered by the plaintiff, as evidence to the jury, ought not to have been received as evidence of presentment of the bill to the acceptors for payment, nor

as evidence of the dishonor of the bill; which is ordered to be certified to the Circuit Court accordingly.

McLean and Woodbury, JJ., dissented as to the effect of the protest, regarding it as sufficient evidence of presentment. They agreed with the majority as to the *necessity* of presentment, the chief point intended to be illustrated here.

WEST *v.* BROWN.

Supreme Court of Ohio, December, 1856. 6 Ohio St. 542.

A note payable generally may be sent to a bank before maturity for collection, and the bank may then give notice of the fact to the maker and require him to come there and make payment.

A room, in the office of another, being one's only place for receiving business calls, and being a place at which one gives notice that word left there will find one, is a proper place for making demand of payment.

The case is stated in the opinion.

BOWEN, J., for the court. — The suit below was on the following note:

'CINCINNATI, Nov. 20, 1854.

'Three months after date I promise to pay to the order of Samuel West one hundred and fifty dollars, value received.

'(Signed) JOSEPH B. BABCOCK.

'(Indorsed) SAMUEL WEST.'

The note was discounted by the defendant and proceeds paid to Babcock, the maker. It was afterward left at the Union Bank for collection. Notice was sent by the bank to Babcock some time before it matured, that this note would fall due on the 23d of February, 1855, at said Union Bank.

Babcock resided in the eastern part of the city. He had no place of business exclusively his own. He was allowed to occupy the office of Mr. Harding, on Vine street, which was the place where he received business calls and directed

them to be made. The business of Babcock at the time was that of a small vender of pamphlets and periodicals in the streets of the city. He had told persons that information left for him at Harding's would find him. The notary public states that he went to the said office of Babcock, on Vine street, between four and five o'clock p. m., on the 23d of February, and demanded payment of the note. He was told there were no funds there to pay, and that Mr. Babcock was out; whereupon he protested the note for non-payment, and on the next day he put a notice in the post-office for West, the indorser, directed to him at Milford, Ohio. West received the notice on the 27th or 28th of February, postmarked Cincinnati, February 26. The notary says that he is confident that he mailed the notice to West before nine o'clock on the day after the protest, and that early business in Cincinnati, at that season of the year, did not commence before seven or eight o'clock in the morning. Milford is fifteen miles from Cincinnati, and it was shown that the mail was closed daily, for that place, at five o'clock a. m., and that all letters put into the office after that hour, for Milford, would not go until the next mail; that in this case the next mail day was Monday, the 26th of February. Sunday, the 25th, intervened, when there was no mail.

West was an accommodation indorser for Babcock.

The cause was submitted to the court below as to West, and a judgment found for the plaintiff, when the defendant moved the court to grant him a new trial, which motion was refused, and a bill of exceptions was tendered and allowed. Judgment was taken by default against Babcock.

Two points are relied on by the plaintiff in error, to reverse the proceedings of the Superior Court. 1. That no such demand of payment was made of Babcock, the maker, as the case required. 2. That there was no legal notice of demand and non-payment served on West, the indorser.

First. This note was deposited with a bank for collection, and, according to the usage of bankers in Cincinnati,

Babcock was personally notified of the place where and of the time when the paper would become due. Although no place of payment was named in the note, yet as the maker resided in Cincinnati, it was not unreasonable to require payment of it to be made at one of the banking houses of the city. It was the manifest duty of Babcock to have taken up the note at the Union Bank, in compliance with the notice which he received for that purpose. But having failed to do that, the notary public called at his place of receiving customers, and formally demanded payment. It is said that the demand ought to have been made at his family residence, and could not be made elsewhere, as he had no well established business office. It seems that he occupied a room at Harding's, where he directed calls to be made and where he received them. By his own acts and declarations he authorized this place to be known as his office for transacting business. He apprised the public that he could be found there, that 'word left there would find him.' He claimed no other business location. He gave no directions or authority for calling on him, for business purposes, at his residence. His desire was to have an office for doing business, where he might conveniently and with certainty be found, and a selection of such place he accordingly made at Harding's, where he was sought by the notary public, but when applied for happened to be out. The object of the visit, however, was fully explained to those who were found in the office. We are satisfied that reasonable diligence in this case was used by the holder of the note to obtain payment from Babcock, and that the claim that no demand of payment was made of him is not well founded.

. . . [On the second point it was held that the defendant was duly notified].

The judgment of the Superior Court is

Affirmed.

TAYLOR v. SNYDER.

Supreme Court of New York, May, 1846. 8 Denio, 145.

The place of date of a promissory note, payable generally, is only prima facie the place of payment; if the maker is known to reside elsewhere presentment must be made accordingly, as where, at the execution of the note, he was known by the holder to reside in another State.

Assumpsit against the indorser of a promissory note, payable generally, but dated at Troy, New York, at which place presentment for payment was made, the maker being a resident of Florida. The plaintiff was nonsuited. Motion for new trial. The facts appear in the opinion.

BEARDSLEY, J., for the court. — As the note bears date at Troy, it is presumed to have been made at that place, although the maker then resided in Florida, as was well known to the original holder, Morris, and to Stevenson, to whom it was subsequently transferred. The residence of the maker had not been changed when the note fell due, his domicile still being in Florida.

The indorser resided in Troy. It was not shown that he ever owned the note, or was under any other obligation for its payment than that of an ordinary indorser; and it may fairly be inferred from the case that the note was given for a debt due from the maker to Morris, and was indorsed for his benefit at the request of the maker.

Some months before the note fell due, the indorser had been asked by the then holder, Morris, if it would be paid at maturity, to which he replied that it would be; that his brother, the maker, would send the money to him, and he should see the note was paid. But on being requested to stipulate, absolutely, to pay the note himself, he declined to do so. It does not appear that on this or any other occasion anything was said as to the place where payment would be made, or where the note should be presented for payment at maturity.

Upon the evidence as stated in the case, I think it cannot be said that anything has been done by the indorser to change or affect his original liability or his rights, in that character. He had not designated any particular place in Troy, or that city at large, as the place at which the note would be paid, or where demand should be made, nor had he been requested to designate any place for that purpose. And although he certainly gave a strong assurance that the maker would remit the money to him, and therefore that the note would be duly paid, he at the same time refused to bind himself absolutely for its payment. He chose to leave his own responsibility where his contract and the law had placed it; and no one had a right to understand from what he said that he intended to assume any new obligation, or to dispense with the performance of any act which the law required the holder of the note to perform. It does not appear to have been suggested on the trial that the action was to be sustained on any such ground, nor was the judge requested to submit the question of a waiver of demand of payment, by the indorser, to the jury. It was doubtless then urged, as it was on the argument at bar, that this note was by law payable at Troy, and therefore the defendant had been duly charged as indorser, and not that he had in any manner waived a demand at the proper place.

What, then, is this case? A debtor, whose residence is in Florida, being at Troy, makes a note, which he dates at that place, to his creditor, a resident of this State, for an amount due to him, and procures a friend residing at Troy to indorse the same. No place of payment is specified in the note, nor is there anything to indicate a place, unless that follows from the note bearing date at Troy. The holder knows the residence of the maker to be in Florida, but when the note falls due, instead of making demand of the maker personally, or at his residence or place of business in Florida, payment is demanded at Troy and not elsewhere. Was this a sufficient demand as respects the indorser? It clearly was, if the note was by law payable at that place, and it

as clearly was not, if the note was payable elsewhere. This is the only question to be determined.

The date of a note at a particular place does not make that the place of payment, or at which payment should be demanded for the purpose of charging the indorser. This was expressly adjudged in the case of Anderson *v.* Drake, 14 Johns. 114. That was an action against the indorser of a promissory note, bearing date in the city of New York, but not made payable at any particular place. When the note was made, the maker lived in New York; but before it fell due he removed to Kingston in the county of Ulster. The counsel for the plaintiff insisted 'that as the note was dated in New York, and the parties resided there at the time it was made, it must be presumed, no particular place being designated for the payment, that it was payable in New York; that the removal of the maker from New York to any other place did not render it necessary for the holder to follow him for the purpose of demanding payment.' But the court thought otherwise, and held that a demand of the maker personally, or at his residence or place of business in Kingston, as in ordinary cases, was necessary, and that the indorser could not be charged upon a demand made in the city of New York, although the note bore date at that place. This I understand to be the settled and invariable rule where the maker has not removed from the State, but has a known residence within its limits. Where, after a note has been given, the maker absconds, removes into another State or country, or is without a fixed residence anywhere, other principles, as we shall see, apply; but in no case does the date of a note, of itself, make that the place where payment should be demanded in order to charge the indorser.

It has been supposed that the case of Stewart *v.* Eden, 2 Caines, 121, countenances a different doctrine. Livingston, J., there said, 'The note being dated in New York, the maker and indorser are presumed to have resided, and contemplated payment, there.' This remark was in part strictly

correct, for the date of the note was presumptive evidence of residence; and in a general sense it may also be true that the date raises a presumption that the parties contemplated payment at that place. Judge Livingston did not say that the note was by law payable at the place of its date; on the contrary, the form of expression conclusively repels that idea. He was not speaking of what the parties were bound to do by the terms of the note, of their legal obligations flowing from their engagements as maker and indorser, but simply of what they were presumed to have contemplated. If the learned judge intended to affirm that a note, when no particular place of payment is otherwise indicated, is by law payable at the place where dated, he would have said so in direct terms, and would not have said it was to be presumed payment at that place was contemplated. This would have been absurd. But in truth the question whether the note in that case was payable where it bore date was not before the court, nor was it there pretended that payment had not been duly demanded. It was an action against the representatives of a deceased indorser; and although an objection was taken to the form in which the presentment for payment was alleged in the declaration, it was not pretended by any one that the demand of payment had not been strictly correct. The main question in the case was as to the sufficiency of the notice to the indorser, and the remark of the judge was made in discussing that point. I admit that upon the question of due diligence in giving notice to an indorser, it may have been very pertinent and proper to say that the parties are presumed to have contemplated payment at the place where the note was given and was dated, although such a remark would be altogether out of place in deciding upon the construction of an agreement, and whether the parties, by its terms, were bound to make payment at a particular place. There is nothing therefore in this remark of Judge Livingston which can be made to countenance the idea that a note, when no other place of payment is specified, is by law payable at the place

of its date. Anderson *v.* Drake, supra; Bank of America *v.* Woodworth, 18 Johns. 315, 322.

Where a promissory note is not made payable at any particular place, the general rule of law is, that in order to charge the indorser payment must be demanded of 'the maker personally, or at his dwelling-house, or other place of abode, or at his counting-house or place of business.' Story, Promissory Notes, § 235; Bank of America *v.* Woodworth, 18 Johns. 315; s. c., in error, 19 Johns. 391. But although such is the general rule, yet, under various circumstances, a demand in any form or manner may be dispensed with. It is a question of diligence, and if a demand is found to be impracticable, proper efforts for that purpose having been made, the indorser will still be held liable, due notice having been given to him by the holder.

Thus, where the maker has absconded, that will ordinarily excuse a demand, and notice of the fact is sufficient to hold the indorser. 1 Ld. Raym. 443, 743; 3 Kent, 5th ed. 96; Putnam *v.* Sullivan, 4 Mass. 45, 53; Lehman *v.* Jones, 1 Watts & S. 126; Chitty, Bills, 10th Am. ed. 354, n. 1; Story, Promissory Notes, § 237.

Where the maker is a seaman on a voyage, having no domicile in the State, the indorser is liable without a demand being made. Barrett *v.* Wills, 4 Leigh, 114. But, although the maker may be absent on a voyage, if he has a domicile in the State, payment must be demanded there. Dennie *v.* Walker, 7 N. H. 199; Whittier *v.* Graffam, 3 Greenl. 82.

And in every case where the maker has no known residence or place at which the note can be presented for payment, the holder will in like manner be excused from making any demand whatever. Story, Promissory Notes, § 237; Whittier *v.* Graffam, supra; Putnam *v.* Sullivan, supra; Duncan *v.* McCullough, 4 Serg. & Rawle, 480. But, in all such cases, the reason for not making a demand must be shown on the trial of the cause. It must appear that the maker had absconded, was at sea, or had no known domicile or place where the note should be presented. The rule is

strict, that a demand must be made, or a proper excuse shown for its omission.

There is a further exception to the rule requiring a demand to be made of the maker, or at his domicile or place of business; for where a note is made by a resident of the State, who, before it is payable, removes from the State and takes up a permanent residence elsewhere, the holder need not follow him to make demand, but it is sufficient to present the note for payment at the former place of residence of the maker. McGruder *v.* Bank of Washington, 9 Wheat. 598, post; Anderson *v.* Drake, supra; Dennie *v.* Walker, supra; Gillespie *v.* Hannahan, 4 McCord, 503; Reid *v.* Morrison, 2 Watts & S. 401; 3 Kent, 96. And this is just; for it is but reasonable to suppose that neither party, when the note was given, looked for a change of residence to a foreign country, and that each contracted upon the supposition that no such change would take place. Nevertheless, as was said in Dennie *v.* Walker, supra, 'this is an exception to the general rule, and must be construed strictly.' 'We think,' say the court in McGruder *v.* Bank of Washington, supra, 'that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice. On this point, there is no other rule that can be laid down which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases that the indorser should stand committed, in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England, to stand committed.'

These exceptions to the general rule, it will be seen, all rest on peculiar reasons. In one, the maker has absconded; in another, he is temporarily absent, and has no domicile or place of business within the State; in a third, his residence, if any he has, cannot be ascertained; while in the fourth, he has removed out of the State and taken up his residence

in another country. In each of these instances, let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note; and it is this new and changed condition of the maker, and that only, by which the indorser stands committed, without a regular demand.

We are, then, to inquire whether these exceptions are to be multiplied, and extended to a case where no change in the condition of either party has taken place; where the maker, when the note was made and indorsed, had a known residence in another State, and which had remained unchanged at the maturity of the note. It is palpable that this exception, if made, must be placed on some new principle; it cannot be allowed on the ground which upholds the others. The facts in this case are unchanged; and, as the reason for making an exception does not exist, the exception itself should not be allowed. Unless, therefore, the general position is true, that one who indorses for a maker who lives in another State may be 'held liable without any demand being made on the maker,' I think the defendant was not liable in the case at bar. And if any such general rule of law as I have stated exists, it certainly may be shown; but that it has no existence is, as I believe, not only according to the universal understanding amongst commercial men, but also according to the settled course of business in the commercial world.

The indorsement of a note is an order to the maker to pay the amount to the indorsee or holder, as is specified and agreed in the note, and an engagement by the indorser that if the note is duly demanded of the maker and not paid, or if it shall be found impracticable to make a demand, the indorser will himself, on receiving due notice, pay the amount to the indorsee or holder. Now, where such an order is drawn upon a maker who resides in another State, and which is well known to the person in whose favor the order is drawn, upon what principle can it be said that a demand of the maker is unnecessary? The indorsee volun-

tarily consents to take such an order, and why should he not perform the condition on which the ultimate liability of the indorser depends? I confess I see no reason why he should not. Here is no mistake, or misapprehension of fact, at the time the indorsement is made. The indorsee knows where the maker resides, and that it is in another State. He knows that by law, unless the intervention of a State line makes a difference, the maker must be sought where he resides, and the demand must be made there. When the time for payment arrives, the maker is still at his former residence; the facts of the case are precisely as they were when the order was drawn. Why, in such a case, should the State line make a difference in the construction and legal effect of this contract of the indorser? It was fairly entered into between the parties; let it then be fairly observed and performed by them.

I can well understand why such an order made by an indorser upon the maker of a note *then residing within this State*, but who removes into another State before the note falls due, should receive a different construction, and that it would be unreasonable to require the holder to follow the maker to his new residence in order to demand payment. Here, a new and unlooked-for event has occurred, which, like the absconding of a maker, or an inability to discover his residence, may very reasonably be held to excuse a demand. In these respects, the indorser should be held to stand committed by the act of the maker. But where the facts, in reference to which the parties contracted, were fully known to them, and are in no respect changed, I am unable to discover any principle which will excuse the maker from making a demand, or using proper diligence to make a demand, as in ordinary cases. The intervention of a State line has, in my opinion, no possible bearing on the question.

I admit that I have not found any case in which this point has been expressly adjudicated as I have stated it. It seems, however, to have been taken for granted, in the

case of McGruder v. The Bank of Washington, already referred to. The case of Duncan v. McCullough, Adm'r, &c., 4 Serg. & Rawle, 480, was, in some of its features, much like the one at bar. It was an action against the administrator of an indorser of a note made by one Adams, bearing date at Baltimore, in Maryland, June 4, 1814, payable nine months from date, no place of payment being specified in the note. It did not appear, otherwise than by its date, where the note was actually made; and it may be inferred from the evidence that Adams was, at that time, a resident at Green Village, Pennsylvania. It did not appear where he was when the note fell due, and no demand of payment had been made anywhere; nor was it shown that any search for the maker had been made. Here, then, was a note dated at Baltimore, no place of payment being stated in it, the maker living in another State. So far it is the case in hand; yet it was not even suggested, by the counsel or the court, that a demand was unnecesssry, or that Baltimore was the proper place to make the demand. The case was disposed of on other grounds, and which could not have been in any respect material, if a demand at Baltimore would have been proper, or if none whatever was necessary. On the trial, the court charged that the plaintiff was bound to prove a demand of payment of the maker, or due diligence used for that purpose, and upon this part of the case the final opinion of the court was thus stated by Chief Justice Tilghman: 'If the plaintiff had proved that Adams had absconded, and was not to be found when the note fell due, a demand of payment would have been dispensed with, because it would have been impossible to make it. But no such thing was proved, and therefore a demand was necessary. The note being dated at Baltimore, would raise a presumption that Baltimore was the drawer's place of residence, as was decided by the Supreme Court of New York in 2 Caines, 127. Baltimore, then, was the place at which inquiry should have been made. The court laid down the law fairly. A demand, or at least due diligence in endeavoring to make a

demand, was necessary.' All this seems to me very just and proper. A demand was necessary: the note was dated at Baltimore, and if the residence of the maker was unknown, Baltimore was the place where the inquiry should have been made. But if, as is now urged, Baltimore was the place to demand payment, or if no demand was required, the argument of counsel in the case referred to and the views of the court were entirely wide of the mark. And here let me observe that, although the date of a note does not make it payable at that place, still the date may, in one respect, be very important. It raises a presumption that the maker resides there, although it is only presumption. 3 Kent, 96, 97; Lowery *v.* Scott, 24 Wend. 358; Galpin *v.* Hard, 3 McCord, 394. And where it becomes a question of due diligence in seeking to make a demand, it may be all important to show that inquiry was made at the place where the note bears date. But here, this point is of no consequence, for the residence of the maker was known to all parties, and not the least effort was made to make demand of him where he lived, or at any other place than Troy, where the indorser resided, the maker then being at his home in Florida.

I am aware that Judge Story, in his treatise on Promissory Notes, after adverting to various grounds on which a demand of payment may be excused, says: 'It seems, also, that if the maker of a promissory note resides and has his domicile in one State, and actually dates and makes and delivers a promissory note in another State, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the State, and has no known place of business there.' § 236. For this he refers to the case of Hepburn *v.* Toledano, 10 Mart. (La.) 643. It will be observed that Judge Story does not give to this position the authority of his name and character; the point is stated doubtingly. It seems, he says, that under such circumstances the maker need not be sought in the State

where he resides, and not that it is clear this will excuse the usual demand. The learned author was obviously doing no more than to state what seemed to him to have been decided in Louisiana, and he does it in a manner which precludes the idea that he intended to adopt the principle, or give to it any authority beyond that of the elevated and able tribunal by which the case was determined. I have looked at the report of the case of Hepburn *v.* Toledano. It was an action against the indorser of a promissory note dated at New Orleans, but not made payable there. When the note was payable the maker resided in Kentucky; but where his residence was when the note was given is not expressly stated. The only question in the case, as the court said, was whether the holder was obliged to go out of the State to demand payment; but whether that question arose upon a note given by a resident of Louisiana, who had subsequently removed to Kentucky, or by a person who lived in Kentucky when the note was made, is a fact upon which I cannot satisfy myself from anything to be found in the report of the case. We have already seen that where the maker removes from one State to another, after the giving of a note, the holder need not follow him. This was said in Anderson *v.* Drake, in 14 Johnson, 114, upon the authority of which the Louisiana case was decided. In the latter case, the court say: 'There is some difficulty as to the place where demand is to be made, when the maker of a note or acceptor of a bill has been a resident of the State, and before the time of payment had changed his domicile; but if he lives in another country, the indorsees cannot be presumed to know his residence, and all that the law requires of the holder is due diligence at that place where the note is drawn. Thus in the case cited by the appellant, 14 Johns. 116, it is stated by the court to have been previously decided that, where a note was dated at Albany, and the drawer of it afterwards removed to Canada, the demand where it was drawn was sufficient to charge the indorser.' And it was held that the demand at New Or-

leans was sufficient. I must say that my impression upon this case is that the maker of the note had removed from Louisiana after the giving of the note; but, if the fact were otherwise, I think the decision should not be followed. The case is not strictly authority, although harmony in the decisions of the several State courts, upon such a point, is exceedingly desirable. But I cannot assent to the principle that where no change has taken place in the residence of the maker, between the making of the note and the time of its payment, the intervention of a State line dispenses with the necessity of making due demand of payment, or at all affects the question. I therefore think the nonsuit was right, and a new trial should be denied.

New trial denied.

MONTELIUS *v.* CHARLES.

Supreme Court of Illinois, January, 1875. 76 Ill. 303.

That a sight bill of exchange is presented to the drawee within reasonable time after delivery, is all the drawer can require.

Appeal from a judgment in favor of the plaintiffs. The case is stated in the opinion.

Scott, J., for the court. — This action was upon an inland bill of exchange, in the name of a remote assignee, against the drawers. One important question is, whether the holders had been guilty of such laches, before presenting it to the drawee for payment, as would bar a recovery against the drawers.

Defendants were engaged in the banking business at Piper City in this State. On the 8th of September, 1873, on the application of James McBride, they drew their draft on the Franklin Bank of Chicago, payable at sight, to the order of John Strank, who then resided at Canton in Dakota. It was, on the same day, deposited in the post-office, directed to the payer at Canton, who received

it after some delay attributable alone to the fault of the mails. Having passed through the hands of several holders, it was presented on the 13th day of October, 1873, to the bank for payment, which being refused, it was protested, and notice given through the post-office to the drawers and the several indorsers. In the meantime the Franklin Bank, on which the draft had been drawn, had failed and gone into bankruptcy.

The law is settled by an unbroken line of decisions that all drafts, whether foreign or inland bills, must be presented to the drawee within a reasonable time, and in case of non-payment notice must be given promptly to the drawer to charge him. But what is a reasonable time, under all the circumstances, is sometimes a most difficult question. The general doctrine is, each case must depend on its own peculiar facts and be judged accordingly.

In Strong *v.* King, 35 Ill. 9, it was declared to be a general rule, that the holder of a sight draft must put it in circulation, or present it for payment at furthest on the next business day after its reception, if within the reach of the person on whom it is drawn. In the case at bar the draft was put in circulation, and the point is made, that the mere fact it was not presented for payment until after the lapse of thirty-five days is per se such laches on the part of the holders as would discharge the drawers.

In Muilman *v.* D'Eguino, 2 H. Black. 565, Eyre, C. J., said: 'Courts have been very cautious in fixing any time for an inland bill payable at a certain period after sight to be presented for acceptance, and it seems to me more necessary to be cautious with respect to foreign bills payable in that manner.[1] If, instead of drawing their foreign

[1] The bill in that case was a foreign bill, drawn in five sets, March 5, 1793, in London, on Calcutta; the sets were sent to India in May following and reached there October 3 of that year. Four of the sets were protested for non-acceptance on the 29th of the same month, and the fifth on the 18th of the next month. The causes of delay are stated in the report of the case. The jury found that there had been no laches, and the verdict was upheld.

bills payable at usances in the old way, merchants choose, for their own convenience, to draw them in this manner and make the time commence when the holder pleases, I do not see how the courts can lay down any precise rule on the subject. I think, indeed, the holder is bound to present the bill in a reasonable time, in order that the period may commence from which the payment is to take place. The question what is a reasonable time must depend on the peculiar circumstances of the case, and it must always be for the jury to determine whether laches is imputable to the plaintiff.' Buller, J.: 'Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at sight, at so many days after, or in any other manner. But here I must observe that I think a rule may thus far be laid down with regard to all bills payable at sight, or at a certain time after sight, namely, that they ought to be put into circulation. If they are circulated, the parties are known to the world and their credit is looked to; and if a bill, drawn at three days' sight, were kept out in that way for a year, I cannot say that there would be laches. But if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say he was guilty of laches.'

Bills, both inland and foreign, having the quality of negotiability, are intended in some degree to be used as a part of the circulation of the country, and are indispensable in the conduct of extended commercial transactions. They afford a safe and convenient mode of making payments of indebtedness between distant points. Banking houses that for a consideration issue such bills must be understood to do so in accordance with the known custom of the country, — that they will be put in circulation for a limited period. If this were not so, their value would be greatly depreciated, and their utility in commercial transactions would be destroyed. Were it understood the purchaser of such a bill was bound to make all possible

despatch to present it to the drawee or lose his recourse on the drawer, no prudent man would feel safe in taking one. He may know the drawer from whom he purchases the bill and be willing to rely on his responsibility; but in many cases he has and can have no knowledge of the drawer's correspondent, the drawee. Commercial usage has therefore placed the responsibility upon the drawer, and he is presumed, in consideration of the premium paid, to assume all risks as to the solvency of the drawee for such reasonable time as the bill shall be kept in circulation. There can be no doubt, if the holder locks it up and keeps it out of circulation, he assumes all risks, and in case the bill is dishonored his laches in that regard would bar a recovery against the drawer. Such bills are not issued with a view to be held as a permanent security, with a continuing liability in the drawer. Illustrative of the law of this branch of the case is Shute *v.* Robbins, 3 Car. & P. 80.

The difficulty is, to determine for what length of time such a bill may be kept in circulation consistently with a continuing liability in the drawer. The rule adopted, as we have seen, is, it must be presented in a reasonable time under all the circumstances. But courts not infrequently experience great perplexity in making a distinction between a reasonable time for the presentation of such paper and laches on the part of the holder. Every case differs so essentially in its facts, it has given rise to many apparently contradictory decisions; but through all of them is noticeable the effort of the courts to ascertain whether the bill was kept in circulation for only a reasonable period in the regular course of business. When that fact is once established, the liability of the drawer is regarded as continuing. It will be found the decisions differ only in what the various courts deemed reasonable in each particular case.

In Robinson *v.* Ames, 20 Johns. 147, the bill declared on was drawn on the 6th of March, but not presented for

payment to the drawee until the 3rd of May. In the meantime the drawee had failed, but it was well-settled that the right of the plaintiff to recover there was no such laches as would discharge the drawer. In Jordan v. Wilson, 28 Tex. 638, the bill in suit was put in circulation and indorsed by defendants without having been presented for acceptance before it came to the hands of the plaintiff. A little more than a month elapsed before he presented it for payment, and that was declared to be according to usage. In Nichols v. Blackmore, 37 Tex. 397, the suit was to recover a draft of sixty-seven or sixty-eight days, but no such laches as would forfeit the right of the holder to recourse against the drawer, in default of payment by the drawee.

Many other cases of the same import might be cited, but these are sufficient for our present purpose. They establish, beyond doubt, the fact that there is no fixed period in which the bill must be presented for payment, but that each case must be decided on its own peculiar facts in the light of commercial usage.

In the case at bar the bill was immediately put in circulation. It was mailed to the payee on the day it bore date, to his proper address in Dakota. Some delay occurred, attributable to interruption in the transmission of the mails, but this fact could not be imputed to the payee as laches. On the receipt the payee immediately undertook and availed of the first opportunity to negotiate the bill. It was kept in circulation, and no delay was suffered other than that incident to the transaction of business in a sparsely populated territory like Dakota. The facts and circumstances proven show no laches on the part of any holder that would operate to discharge the drawers.

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Judgment affirmed.

ORIDGE v. SHERBORNE.

Court of Exchequer, of England, May, 1843. 11 Meeson & W. 374.

A promissory note payable by instalments is assignable within the Stat. 3 & 4 Anne, c. 9; and the maker is entitled to the days of grace upon the falling due of each instalment.

Assumpsit by indorsee against payee of a promissory note, dated 19th November, 1838, payable to the defendant by instalments on the 19th of November in each succeeding year, for seven years. This action was brought to recover the amount of the instalment due on the 19th of November, 1842. There were pleas denying that the note was duly presented for payment, or that the defendant had due notice of the presentment and dishonor. At the trial it appeared that the note was presented for payment of the instalment in question on the 22d of November, the plaintiff thus allowing the three days of grace usually given in the case of negotiable instruments; it was dishonored, and notice of the dishonor was given to the defendant the next day. It was objected for the defendant that the presentment and notice of dishonor were too late; that a promissory note payable by instalments was not a negotiable instrument within the law and custom of merchants, and the maker thereof was not entitled to days of grace at all; or, if he were, they could be allowed only for payment of the last instalment. The judge overruled the objection, and the plaintiff obtained a verdict. Rule nisi for a new trial.

PARKE, B. I think the rule in this case ought to be discharged. The question is, whether, on a promissory note payable by instalments, the usual three days of grace are to be allowed or not. In order to determine this point, the first question that presents itself is, whether such an instrument is a promissory note at all, within the Stat. 3 & 4 Anne, c. 9, so as to entitle any party into whose

payment to the drawees until the 20th of May. In the meantime the drawees had failed; but in a well-reasoned opinion the court came to the conclusion there was no such laches as would discharge the drawer. In Jordan *v.* Wheeler, 20 Tex. 698, the bill in suit was put in circulation and indorsed by defendants without having been presented for acceptance before it came to the hands of the plaintiff. A little more than a month elapsed before he presented it for payment, and that was declared to be according to usage. In Nichols *v.* Blackmore, 27 Tex. 586, the court was of opinion a delay of forty-seven or forty-eight days was not such laches as would forfeit the right of the holder to recourse against the drawer, in default of payment by the drawee.

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hands it may come to sue upon it; for, if so, there will be no difficulty in extending to it the same rule as prevails in the case of bills of exchange; namely, that days of grace are to be allowed in all cases where a sum of money is by such a negotiable instrument made payable at a fixed day. Now, in order to render this valid as a promissory note, we must first consider whether it might be sued on by the original parties to it. It is well known that, before the passing of the Stat. 3 & 4 Anne, c. 9, it was the opinion of Lord Holt that a promissory note was only *evidence* of a debt, and not an instrument of obligatory force in itself. Then came the statute, which puts promissory notes on the footing of inland bills of exchange. The preamble recites that it had been held 'that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person or his order any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed, or made payable could not, within the said custom of merchants, maintain an action against the person who first drew and signed the same.' The statute is thus directed to two grievances, — that the note is not assignable, and that it is not the subject of an action. Therefore, 'to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange,' the statute in the first section goes on to enact that 'all notes in writing, whereby any person, body politic or corporate, shall promise to pay to any other person or persons, body politic or corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, etc., to whom

the same is made payable.' These words are general, and without any limitation as to the *mode* in which the money is to be paid. The section goes on to enact that 'every such note shall be made assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, etc., to whom any such sum of money shall be by such note made payable, may maintain an action for the same, in such manner as they might do upon any inland bill of exchange made or drawn according to the custom of merchants, against the person or persons who signed the same; and that any person or persons, body politic or corporate, to whom such note is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, may maintain their action for such sum of money either against the person, etc., who signed such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange.' On the provisions of this statute, therefore, we find no limitation imposed as to the manner in which the money is to be made payable; and consequently, unless there is some established rule or settled practice to the contrary, a promissory note must be deemed good within the statute, whether it be to pay an entire sum at once, or to pay it by instalments. No case has been cited to show that a promissory note in the latter form is not good, and we must therefore look at the course pursued in practice since the statute. Speaking from modern experience (and mine in this respect has been of some standing), I have no doubt that numerous actions have been brought by the original parties in whose favor such notes have been made; indeed, that this is so every gentleman in the habit of drawing under the bar can testify; and it is now much too late to say such actions as those are not maintainable. And if promissory notes are within the first clause of the statute, I see no sufficient reason why they should not also be within the second, and conse-

quently assignable to an indorsee. Besides the invariable practice on this subject, and the fact that actions on notes of this kind have been so numerous, that it is, I may say, impossible that the present objection should not have been taken in some of them, if there were really any weight in it, several reported cases have been referred to, in which such actions were brought, and no objection taken that they would not lie on the ground suggested in this case, although other objections *were* taken. One is that of Donaldson *v.* Thompson, 6 M. & W. 316, to which may be added those of Ashford *v.* Hand, Andr. 370, and Josselyn *v.* Lacier, 10 Mod. 294. If there had ever been any idea that a promissory note of this nature was not within the statute of Anne, the objection would certainly have been taken; although I rely more on the established modern usage, and think it too late to raise this objection now. If, then, this is admitted to be a promissory note, suable on and indorsable under the statute, the next question is respecting the allowance of the usual days of grace upon it. Now, in the case of Brown *v.* Harraden, 4 T. R. 148, it is said that, with respect to the allowance of days of grace, the rule is exactly the same in the case of a promissory note as of a bill of exchange; namely, that they are always to be allowed, when the instrument is for the payment of money at a certain time, as after a certain number of days or after sight, but not when it is only payable on demand. That rule we must adopt in this case; and as this note is suable on and indorsable under the statute of Anne in the same manner as bills of exchange were before, — as both instruments are thereby simply put upon the same footing, — the days of grace for both must be the same, and consequently ought to be allowed on this promissory note.

Alderson, B. I am of the same opinion. Notes of this nature are within the literal words of the statute of Anne; and when we are called upon to decide whether they

are *virtually* within it, we ought to look to the invariable practice which has existed in such cases. My brother Parke has referred to the modern practice on this subject, in which he has had great experience; then we have the fact that the intermediate parties to promissory notes in this form have sued upon them, and that there is a number of decided cases in which the declarations would have been bad if this objection had prevailed. Again, if we look at the Stamp Act, we shall find that the legislature itself has taken a similar view of this matter, and treated instruments in this form as negotiable, by imposing a stamp duty upon them. We thus have the opinion of those persons who have all along been employed in drawing declarations, and the opinion of the legislature itself; and, in addition to all these, we have impliedly the concurrence of Mr. Baron Bayley, a great authority in questions of this nature, who, in his work on Bills of Exchange, when speaking of the requisites necessary to constitute a good bill, mentions every other objection which can be raised, but makes no exception of such as are made payable by instalments; which would certainly have been a very great omission, if the present objection be well founded. The same observation may be made as to other text-books which treat on this subject. Taking, then, all these matters together, they seem to establish that communis consensus, which we are told facit jus, of all persons to adopt the literal construction of the statute of Anne, and which ought on this account to prevail with us in the present case. If, then, a promissory note payable by instalments be within that statute at all, it must be so to the whole extent of the statute; so that not only may the original parties to the note sue upon it, but so also may all collateral parties, the instrument being indorsable like any bill of exchange, and subject to the incidents of such indorsement. The only question in the present case, therefore, being that relative to the days of grace on this note, on which we think the decision at the trial was correct, the present rule must be discharged.

payment to the drawees until the 20th of May. In the meantime the drawees had failed; but in a well-reasoned opinion the court came to the conclusion there was no such laches as would discharge the drawer. In Jordan *v.* Wheeler, 20 Tex. 698, the bill in suit was put in circulation and indorsed by defendants without having been presented for acceptance before it came to the hands of the plaintiff. A little more than a month elapsed before he presented it for payment, and that was declared to be according to usage. In Nichols *v.* Blackmore, 27 Tex. 586, the court was of opinion a delay of forty-seven or forty-eight days was not such laches as would forfeit the right of the holder to recourse against the drawer, in default of payment by the drawee.

Many other cases of the same import might be cited, but these are sufficient for our present purpose. They establish, beyond doubt, the fact that there is no fixed period in which the bill must be presented for payment, but that each case must be decided on its own peculiar facts in the light of commercial usage.

In the case at bar the bill was immediately put in circulation. It was mailed to the payee on the day it bore date, to his proper address in Dakota. Some delay occurred, attributable to interruption in the transmission of the mails, but this fact could not be imputed to the payee as laches. On the receipt the payee immediately undertook and availed of the first opportunity to negotiate the bill. It was kept in circulation, and no delay was suffered other than that incident to the transaction of business in a sparsely populated territory like Dakota. The facts and circumstances proven show no laches on the part of any holder that would operate to discharge the drawers.

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Judgment affirmed.

ORIDGE v. SHERBORNE.

Court of Exchequer, of England, May, 1843. 11 Meeson & W. 374.

A promissory note payable by instalments is assignable within the Stat. 3 & 4 Anne, c. 9; and the maker is entitled to the days of grace upon the falling due of each instalment.

Assumpsit by indorsee against payee of a promissory note, dated 19th November, 1838, payable to the defendant by instalments on the 19th of November in each succeeding year, for seven years. This action was brought to recover the amount of the instalment due on the 19th of November, 1842. There were pleas denying that the note was duly presented for payment, or that the defendant had due notice of the presentment and dishonor. At the trial it appeared that the note was presented for payment of the instalment in question on the 22d of November, the plaintiff thus allowing the three days of grace usually given in the case of negotiable instruments; it was dishonored, and notice of the dishonor was given to the defendant the next day. It was objected for the defendant that the presentment and notice of dishonor were too late; that a promissory note payable by instalments was not a negotiable instrument within the law and custom of merchants, and the maker thereof was not entitled to days of grace at all; or, if he were, they could be allowed only for payment of the last instalment. The judge overruled the objection, and the plaintiff obtained a verdict. Rule nisi for a new trial.

Parke, B. I think the rule in this case ought to be discharged. The question is, whether, on a promissory note payable by instalments, the usual three days of grace are to be allowed or not. In order to determine this point, the first question that presents itself is, whether such an instrument is a promissory note at all, within the Stat. 3 & 4 Anne, c. 9, so as to entitle any party into whose

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ton *v.* Lewis, 2 Conn. 479, and Camp *v.* Bates, 11 Conn. 487, are decisive on this point.

The other and more important question in this case is, whether the plaintiffs are excused for the non-presentment of this draft for payment on the day when it became due. The last day of grace being Sunday, it was payable on the preceding Saturday, which was the second day of June, 1849. This question depends on whether the plaintiffs are chargeable with negligence in not presenting it on that day.

If the agent of the plaintiffs, to whom they sent it to be forwarded for presentment and collection, and who transacted this business for them, was guilty of such negligence, it is, of course, imputable to the plaintiffs. And it is not important to this question either that the defendants, in fact, sustained no damage by the draft not having been presented for payment when it fell due, or that it would not have been paid by the acceptor, if it had then been presented. The indorser, on a question of due presentment for payment, is not affected by either of these circumstances. Nor, indeed, do the plaintiffs claim to recover on either of these grounds.

The question of negligence here presented depends on the inquiry whether, under the circumstances of this case, the delay of the plaintiffs' agent in not forwarding this draft to Philadelphia until the last mail left New York for that place, on the day next preceding that on which the draft fell due, constituted a want of reasonable or due diligence in regard to its presentment. We say under the circumstances, because there is no positive or absolute rule of law which determines within what precise time the holder of a bill of exchange must, in all cases whatever, or at all events, avail himself of the authorized mode of transmission adopted in this instance, to forward such paper for presentment. The general principle, established by all the adjudged cases, as well as the approved elementary writers, is, that reasonable diligence in the presentment of a bill for payment is required of the holder, and that, therefore, if

there has been no want of such diligence, he is excused. Story, Bills, c. 10; Chitty, Bills, c. 9, 10; Story, Prom. Notes, c. 7, § 368; Patience v. Townley, 2 Smith, 223, 224.

In applying this principle, the general rule is, that it must be presented for payment on the very day on which, by law, it becomes due, and that, unless the presentment be so made, it is a fatal objection to any right of recovery against the indorser. But, although this is the general rule, it is not a universal one, and prevails only under the qualification, which is really a part of the rule itself, that there is no negligence, or want of reasonable diligence, in not making such presentment. The whole rule, therefore, more properly stated, is, that the presentment must be on the day on which the bill becomes due, unless it is not in the power of the holder, by the use of reasonable diligence, so to present it. By the very statement of this rule, as thus fully expressed, it is plain that, on the question whether the holder is excused on this ground for not thus presenting it, or, in other words, whether there was negligence on his part, or a want of reasonable diligence, no absolute or positive rule can, from the nature of the case, be laid down which shall apply under all circumstances. We have no evidence of any general custom of merchants in regard to the precise time within which mercantile paper is usually forwarded, in order to be presented for payment, so that the law merchant furnishes us no guide on this point. And it is clear that the strict rule of the common law, by which an inability to perform the terms or condition of a contract, by reason of inevitable accident or casualty, constitutes generally no excuse for their non-performance, is not applicable to mercantile instruments of this description. Therefore, the excuse for non-presentment in this case presents the ordinary question of negligence. That question may, and often does, depend on such a variety of circumstances, or those of such a peculiar character, that it is very difficult, if not impossible, to reduce them to any fixed or invariable rule. But, in regard to such a question, as appli-

cable to the non-presentment of a bill or note when it is due, it is considered a well-settled rule that such want of presentment is excused by any inevitable or unavoidable accident not attributable to the fault of the holder, provided there is a presentment by him as soon afterward as he is able; by which is intended that class of accidents, casualties, or circumstances which renders it morally or physically impossible to make such presentment. Judge Story, in speaking of this ground of excuse, says: 'It has been truly observed by a learned author,' referring to Mr. Chitty, 'that there is no positive authority in our law which establishes any such inevitable accident to be a sufficient excuse for the want of a due presentment. But it seems justly and naturally to flow from the general principle, which regulates all matters of presentment and notice, in cases of negotiable paper. The object, in all such cases, is to require reasonable diligence on the part of the holder; and that diligence must be measured by the general convenience of the commercial world, and the practicability of accomplishing the end required, by ordinary skill, caution, and effort.' And he cites the remark of Lord Ellenborough, in Patience *v.* Townley, 2 Smith, 223, 224, that due presentment must be interpreted to mean, presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within regular time. Story, Bills, § 258.

Applying these principles to this case, we are of opinion that the plaintiffs are not chargeable with a want of reasonable diligence.

No fault or impropriety is imputable to them, by reason of their having selected the public mail as the mode of forwarding the draft in question, to the bank in Philadelphia, where it was payable. It is properly conceded by the defendants that such mode of transmission was in accordance with the general commercial usage and law, in the case of paper of this description. Indeed, it is recommended in

the books as the most proper mode of transmission, as being the least hazardous, and therefore preferable to a special or private conveyance. But, although the public mail was a legal and proper mode by which to forward this paper, it was their duty to use it in such a manner that they should not be chargeable with negligence or unreasonable delay. If, therefore, they put the draft into the post-office at so late a period that, by the ordinary course of the mail, it could not, or there was reasonable ground to believe that it would not, reach the place of its destination in season for its presentment when due, we have no doubt that there would be, on their part, a want of reasonable diligence, which would exonerate the indorser. On the other hand, to throw the risk of every possible accident, in that mode of forwarding the draft, upon the holder, where there has been no such delay, would clearly be most inconvenient, unreasonable, and unjust, as well as contrary to the expectation and understanding of the indorser, who is presumed to be aware of the general usage and law in regard to the transmission, by mail, of this kind of paper, and must therefore be supposed to require only reasonable diligence in this respect on the part of the holder; and would, indeed, be inconsistent with the rule itself, which sanctions its transmission in that manner. It has been suggested that the principle should be adopted, that when the holder resorts to the public mail, he should be required to forward the presentment at so early a period, that if by any accident it should not reach the place of its presentment in the regular course of the mail there should be time to recall it, and have it presented when and where it falls due; or that, at least, it should be forwarded in season to ascertain whether it reached there by that time, and to make such a demand or presentment for payment as is required in the case of lost bills. We find no authority whatever for any such rule, nor would it, in our opinion, comport with the principle now well established, requiring only reasonable diligence on the part of the holder, or with the policy which prevails in regard to

such commercial instruments. It would, in the first place, be the means of restraining the transfer of such paper within such a limited time as to impair, if not to destroy, its usefulness and value, arising out of its negotiable quality; and, in the next place, it would in many cases be wholly impracticable. The casualties incident to this mode of transmission are most various in their character, and cannot, of course, be foreseen; and they might, in the case of forwarding mercantile paper, be such as to render it impossible to ascertain its miscarriage, or to recall it in season to remedy the difficulty. In the case of the draft now before us, for example, if it had been placed by the plaintiffs in the post-office at Windham, where they were located, and transacted their business, for transmission direct from thence to Philadelphia, on the very day when they became the holders of it, which was between three and four months before it became due, and, by an accident or mistake of the postmaster in the former place, similar to that which occurred in this case at New York, it had been mailed to one of the most distant parts of our country, or to a foreign country (which would not have been more singular than that it should have been mistakenly mailed, as in the present case, for Washington), it might not have been practicable for the plaintiffs to learn the accident, or obviate its effect, before the paper fell due. In short, such a rule as that suggested would be merely artificial in its character, productive of great inconvenience and injustice in particular cases, without any corresponding general benefits, and change the whole course of business in regard to a most extensive and important class of mercantile transactions. Nor has any other arbitrary or positive rule been suggested which is not equally obnoxious to the same or similar objections.

The only remaining inquiry is, whether the plaintiffs are chargeable with negligence for not forwarding the draft in question by an earlier mail from New York to Philadelphia. It was sent by the usual, legal, and proper

mode. It was deposited in the post-office in season to reach the place where it was payable, before it fell due, by the regular course of the next mail; and there was no reason to believe that it would not be there duly delivered. It was actually sent by that mail, and, but for the mistake of the postmaster where it was mailed in misdirecting the package containing it, would have reached its proper destination, and been received there in season for its presentment when due. It in fact reached that place when it should have done, but was carried beyond it in consequence of that mistake. As that mistake could not be foreseen or apprehended by the plaintiffs, it is not reasonable to require them to take any steps to guard against it. Indeed, they could not have done so, as they had no control or supervision over the postmaster. They had a right to presume that the latter had done his duty. They could not know that he had misdirected the package until it was too late to remedy the consequences. The occurrence of the draft being sent beyond its place of destination was, therefore, so far as the plaintiffs were concerned, an unavoidable accident. It happened, not in consequence of any delay of the plaintiffs in putting the draft into the post-office at so late a period that it could not, or probably would not, reach its destination in due season, but merely in consequence of the act of the official to whom it was properly confided, done after it was properly in his charge, by the plaintiffs, for transmission. The accident, moreover, was of a very peculiar and extraordinary character, and quite different from those which are ordinarily incident to that mode of transmission, and against which it would be extremely difficult, if not impossible, to guard. It would have been equally liable to occur at any time when the draft should have been placed in the post-office. It was not owing in any sense to the fault of the plaintiffs, but solely to that of the postmaster. Under these circumstances, we do not feel authorized to impute any blame or negligence to the plaintiffs. We are, therefore,

of opinion that judgment should be rendered for the plaintiffs.

In this opinion the other judges concurred.

Judgment for the plaintiffs.

HALE *v.* BURR.

Supreme Court of Massachusetts, March, 1815. 12 Mass. 86.

Where the maker of a promissory note dies, and an administrator is appointed before the note falls due, a demand upon the administrator is not necessary, in order to charge the indorser, so that notice of the death and non-payment be duly given to him; unless the maturity of the note happens more than a year after the appointment of the administrator.

Assumpsit by the indorsee against the defendant as indorser of a promissory note, signed by Joseph Francis, payable to the defendant or his order, in sixty days and grace, dated August 1st, 1812.

At the trial of the action, which was had before the present Chief Justice, November term, 1813, on the general issue, it was in evidence, that Joseph Francis, the promisor, died on the 4th of September, 1812, and that administration of his estate was duly committed to William Dodd on the 14th of the same September, and that he gave legal notice of his appointment. The note was lodged in the Union Bank, in Boston, for collection. At the time it fell due, the runner of the bank left a notification at the counting-room formerly occupied by the said deceased, and where he usually did business. No demand was made upon the said administrator, who lived, and had a place of business, in Boston, which was known to the runner, by whom notice was given to the defendant.

One Dench, the former clerk of the deceased, at the request of the creditors, took care of the property of the deceased, and occasionally went to the counting-room, until the said Dodd was appointed administrator. The said Dodd then took all the books and papers of the

deceased to his own store, and took the sole charge of his other property. Before the note became due, all the property of the deceased was sold and delivered; and the counting-room was not used for some time before. The estate of the deceased was proved to be insolvent.

A verdict was returned for the defendant by direction of the judge; and it was agreed, that, if the court should be of opinion that a demand upon the administrator, under the circumstances of this case, was not necessary to entitle the plaintiff to recover, the verdict should be set aside, and the defendant should be defaulted; otherwise, that judgment should be rendered on the verdict.

PARKER, C. J., for the court. — The question presented in this case is, whether an indorsee of a negotiable promissory note can maintain an action against the indorser, the promisor having died, and an administrator having been appointed and duly qualified to act, before the day of payment, without proving a demand upon such administrator at the maturity of the note. Whether such demand was actually made or not, according to the usage of the bank where the note was left for collection, was a question for the jury; and by the verdict it is established that none was made. But, as the jury were instructed that such a demand was necessary, if that instruction was not right, the verdict must be set aside.

And we are all of opinion that the instruction was wrong; and that it is not necessary, to charge the indorser, that a demand should be made of the administrator. The authorities cited by the defendant's counsel[1] go merely to prove, that, in order to obtain a protest of a bill of exchange, or to charge the drawer or indorser, if the payer be dead, it is incumbent on the holder to present the bill to his personal representative, if he live within a reasonable distance.

[1] Chitty on Bills, Story's ed. 172, 182: Molloy, L. 2, c. 10, § 34; Pothier, 146.

From the strong analogy subsisting between bills of exchange and promissory notes, it is possible that this rule of law may be as applicable to the latter species of contract as to the former. Yet no authority has been cited to show that the rule has been applied to promissory notes, or to any instrument other than a foreign bill of exchange, where by the law merchant a protest is necessary.[1]

In England, however, there may be reasons for making a demand upon an executor or administrator of a deceased promisor in a note necessary, which do not exist in this country; and, if the reasons upon which the law is founded do not exist, there is no cause why we should not decide according to the nature and spirit of the contract.

In this State a demand upon an administrator would, in most cases, be entirely nugatory. He is not obliged to pay any debt of the deceased, except such as are particularly privileged, until a year from his appointment. If sued within the year, he is entitled to a continuance, of course. This indulgence is given to enable him to collect the effects of the deceased, and to ascertain their sufficiency to discharge all the debts. If there should be a deficiency, a general distribution takes place among all the creditors, without regard to the character of their demands, unless in the few excepted cases above alluded to. Under these circumstances, should he pay any debt, and it should afterwards appear that the estate is insolvent, he pays at his peril. A prudent executor or administrator will, therefore, seldom hazard the payment of a debt before he has ascertained the situation of the estate; and a demand upon him would be sure to meet with a refusal. Such a demand would, therefore, be merely a troublesome formality, without any use ; and notice to the indorser, that (the promisor being dead) he will be looked to for payment, will in every respect be as advantageous to him as a previous demand upon the promisor.

[1] But see Chitty on Bills, 6th ed. 246–262; Bayley on Bills, 5th ed. 219; Thomson on Bills, 444; Price *v.* Young, 1 Nott & M'Cord, 438; Roscoe, Ev. 158, 2d ed.; 2 Phil. Ev. 22.

It is well settled, that, if the promisor abscond before the day of payment, or has concealed himself, the necessity of a demand is taken away.[1] Due diligence to find him is all that is required in the latter case; and, in the case of absconding, even that is not necessary.[2] When the party is dead, and his representative is not obliged to pay his debts for a year after he assumed the trust, it would seem as idle to require a demand of him as it would be to pursue one who has absconded.[3]

In England there may be more reason for requiring such demand; for there the representative is at liberty to pay the debts, although there should not be enough to pay all, if he has regard to their rank and degree; and he may always discharge himself by showing that he has paid away all that he has received. He may, therefore, pay a bill of exchange, or promissory note, when called upon. But in this country it is otherwise; for, where the estate is insolvent, as in the present case, there is no reason to presume that a demand would be effectual.

We do not decide, that, when a note shall fall due after the expiration of the time allowed the executor or administrator, by our statute, upon an estate not represented insolvent, a demand upon him, or due diligence to make one, must not be proved. But in the present case we are satisfied that no such demand was necessary. The verdict must, therefore, be set aside, and the defendant be called.[4]

Defendant defaulted.

[1] Chitty, 70; L. Raym. 743.

[2] Putnam v. Sullivan, 4 Mass. Rep. 45; Widgery v. Munroe, 6 Mass. Rep. 449; Whittier v. Graffam, 3 Greenl. 82.

[3] Thomson on Bills, 444.

[4] Burrill v. Smith, 7 Pick. 291.

DANA *v.* SAWYER.

Supreme Court of Maine, April, 1843. 22 Maine, 244.

Presentment of a promissory note to the maker at near midnight, after he has retired to rest, is not presumptively at a reasonable hour.

This case was submitted on the following statement of facts: The action is on a promissory note, signed by T. Sawyer & Co., dated Dec. 24, 1838, for $202.50, on four months, payable to and indorsed by the defendant.

It is agreed that on the day the note fell due, George W. Smith came to the house occupied by said Thorndike Sawyer and Samuel H. Sawyer, the defendant, in the evening, between eleven and twelve o'clock, called up said T. Sawyer from his bed, and presented the note to him for payment, which he did not pay, and left with him a notice and demand for payment, and delivered another notice of non-payment by the makers of the note, directed to said S. H. Sawyer, and demand of payment to said T. Sawyer for said Samuel, which said Thorndike did not deliver to said Samuel. Said Samuel was then in the house, but was in bed. He had his residence in the same house.

The court were to enter a nonsuit or default, as they might determine to be the law in the matter.

Shepley, J., for the court. — This case is presented upon an agreed statement of facts, from which it appears that a demand for payment was made upon the maker of the note, between eleven and twelve o'clock at night on the day that it became payable, by calling him from his bed; and that he did not pay it. There is no further statement of anything else said or done, except that a notice and demand for payment was left with him. When a bill or note is payable at a banking-house, or other place, where it is well known that business is transacted only during

certain hours of the day, the law presumes that the parties intended to conform to such established course of business, and requires that a demand should be made during those business hours. Parker *v.* Gordon, 7 East, 385. The cases of Garnett *v.* Woodcock, 1 Stark. 475, and of Henry *v.* Lee, 2 Chitty, 124, may show an exception to this rule that, when a person is found at such place after business hours authorized to give an answer, the demand will be good; while it may be difficult to reconcile these cases with the case of Elford *v.* Teed, 1 M. & S. 28. When the bill or note is not payable at a place where there are established business hours, a presentment for payment may be made at any reasonable hour of the day. Leftley *v.* Mills, 4 T. R. 174; Barclay *v.* Bailey, 2 Camp. 527; Triggs *v.* Newnham, 10 Moore, 249; Wilkins *v.* Jadis, 2 Barn. & Adol. 188. What hour may be a reasonable one has come under consideration in those cases. In the first of them Mr. Justice Buller observes, that 'to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences.' In the second, Lord Ellenborough said, 'If the presentment had been during the hours of rest, it would have been altogether unavailing.' In the third, this remark, among others, is quoted and approved by C. J. Best. In the fourth, Lord Tenterden remarked, that 'a presentment at twelve o'clock at night, when a person has retired to rest, would be unreasonable.' These observations, so just and so applicable to this case, authorize the conclusion that the demand was not made at a reasonable hour, unless the fact that the maker was seen and actually called upon at that time should make a difference. Perhaps, in analogy to the exception already noticed, it might be proper to admit of one in this and the like cases, if it should appear from the answer made to the demand that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour. But there is nothing in this agreed

statement to show that payment might not have been refused because the demand was made at such an hour that the maker did not choose to be disturbed, or because he could not then have access to funds prepared and deposited elsewhere for safety.

Plaintiff nonsuit.

FARNSWORTH *v.* ALLEN.

Supreme Court of Massachusetts, October, 1855. 4 Gray, 453.

To charge an indorser, the holder must make presentment at a reasonable hour of the day. Presentment as late as nine o'clock in the evening, in August, is reasonable if due endeavor under all the circumstances down to that time has been made to make it, without success.

Action of contract against the indorser of the following promissory note: 'Boston, May 23, 1853. Three months after date I promise to pay to the order of Walter M. Allen one hundred and fifty dollars, value received. Francis Freeman.'

At the trial in the court of Common Pleas, a witness testified that he received the note, at the close of bank hours on the last day of grace, from the Grocers' Bank in Boston, who had received the note for collection from the Cambridge Market Bank, but did not know the residence of the maker or indorser; that he inquired of a director of the Cambridge Market Bank, and learned that the maker lived at Winchester and the indorser at North Cambridge; and the same afternoon carried the note to a notary public in Charlestown, and told him where the parties resided.

The notary public testified that, as soon as he could after receiving the note for protest, he went to the house of the maker (about ten miles from Boston), and arrived there about nine o'clock in the evening; that there was no light in the house, and the inmates appeared to have retired for the night; that he rung the bell, and after some time the maker came to the door with a light; and he presented the note, stated its contents, and demanded

payment, which the maker refused, saying that he could not, or should not, or would not pay it; that he returned with the note to Charlestown, and on the same evening put in the post-office a proper notice of dishonor, addressed to the defendant at North Cambridge.

The defendant contended that the demand proved was not sufficient to charge the indorser. But Hoar, J., ruled otherwise, the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Bigelow, J., for the court. — The note declared on, not being payable at a bank, or at any place where business was transacted during certain stated hours in each day, was properly presented to the maker at his place of residence. It was also the duty of the holder to present it within reasonable hours on the day of its maturity. No fixed rule can be established, by which to determine the hour beyond which a presentment, in such case, will be unreasonable and insufficient to charge an indorser. Generally, however, it should be made at such hour that, having regard to the habits and usages of the community where the maker resides, he may be reasonably expected to be in a condition to attend to ordinary business. In the present case, taking into consideration the distance of the place of residence of the maker from Boston, where the note was dated, and where it was held when it became due; the means that were taken to ascertain the residence of the maker, and the season of the year at which the note fell due, we are of opinion that a presentment at nine o'clock in the evening was seasonable and sufficient. It is quite immaterial that the maker and his family had retired for the night. The question whether a presentment is within reasonable time cannot be made to depend on the private and peculiar habits of the maker of a note, not known to the holder; but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it seasonable or otherwise. Barclay *v.* Bailey, 2

Campb. 527; Triggs *v.* Newnham, 10 Moore, 249, and 1 Car. & P. 631; Wilkins *v.* Jadis, 2 B. & Ad. 188; Cayuga County Bank *v.* Hunt, 2 Hill (N. Y.), 635.

Exceptions overruled.

OTSEGO COUNTY BANK *v.* WARREN.

Supreme Court of New York, August, 1854. 18 Barb. 290.

A notarial certificate of protest of a bill of exchange drawn upon W, C, & Co., reciting that the bill was presented 'to one of the firm of W, C, & Co., the acceptors,' for payment, and dishonored, is not sufficient.

Action against indorsers of an inland bill of exchange drawn upon 'Warren, Clark, & Co., 363 Washington St., N. Y.,' and accepted by that firm. At maturity the bill was presented to the acceptors for payment, and dishonored. It was now protested by a notary public, the certificate of protest reciting that the notary presented the draft for payment 'to one of the firm of Warren, Clark, & Co., the acceptors, and demanded payment, which was refused.' The certificate was admitted in evidence of due presentment, against objection; and exception was taken to the ruling thereon. Verdict for the plaintiff. [This is but part of the case, but the rest is omitted as foreign to the purpose here in view].

Bacon, J., for the court. — This cause, it appears, has been twice tried at the Otsego Circuit, presenting on the last trial some features which did not exist, or were not made to appear, on the first. On the first trial, which occurred in September, 1851, the rulings on the only two points to which exceptions were taken were in favor of the plaintiffs. The first was in regard to the sufficiency of the certificate of the notary, to prove a due presentment for payment of the draft on which the suit is brought. The bill was drawn on a firm in the city of New York, and directed to them, by the name of Warren, Clark, & Co., 263 Washington St.,

New York. The certificate of the notary stated that he presented the draft for payment 'to one of the firm of Warren, Clark, & Co., the acceptors, and demanded payment, which was refused.' The defendant's counsel objected to the reading of the certificate in evidence, on the ground that it did not state the name of the person of whom the demand was made; but this objection was overruled, and the certificate was read in evidence. The other exception turned upon the effect of a general assignment made by the drawers of the bill to Cyrenus Warren, to dispense with the proof of due demand and notice as to him; but as this point is not presented in the case now before the court, it is not necessary for the court further to consider it.

The Supreme Court, at the general term in the sixth district upon the argument of the bill of exceptions, reversed the ruling at the circuit, holding that the certificate was defective, inasmuch as it did not state who composed the firm nor the name of the person of whom the demand was made; and the cause was sent back for a new trial.

Upon the second trial, which took place at the Otsego circuit in December, 1853, the plaintiffs' counsel again offered in evidence the certificate of the notary, stating as before that he presented the draft to 'one of the firm of Warren, Clark, & Co., and demanded of him payment thereof, which was refused.' The defendant's counsel thereupon interposed several objections to the admissibility of the certificate in evidence, among which were these, that it did not state the name of the person of whom the demand was made, nor where it was made. And the circuit judge, in accordance with the decision of the general term, rejected the certificate. This point having been argued and deliberately decided by the full court in the sixth circuit, must be held to be the law of this case, and I may add that I concur in the decision, although not entirely or exclusively upon the grounds stated in the opinion. It seems to me that the certificate is further defective

in not stating the place where the demand was made. The draft, it will be noticed, is addressed to the acceptors at a particular number and street, in the city of New York, the same being doubtless their place of business. The general rule is that when the acceptance is by partners, then the presentment for payment should be at their place of business, or at the dwelling-place of either of them. Bayley on Bills, ch. 7, § 2; Story on Bills of Exch. § 362. In the case of the Seneca County Bank *v.* Neass, 5 Denio, 329, the note was payable at the bank, and the notarial certificate stated that the note was presented to the cashier of the bank; and it was held insufficient, because it did not appear by the certificate that it was done at the bank. In that case the defect was supplied by oral proof; and unless the place of demand is made to appear by the certificate, or by proof aliunde, the evidence of a due presentment seems to me wholly defective.

. . . . . .

[The rest of the opinion relates to questions of evidence passed upon at the second trial, which are foreign to the purpose for which the case is here given.]

MILLS *v.* BANK OF THE UNITED STATES.

Supreme Court of the United States, February, 1826. 11 Wheat. 431.

Notice to an indorser is not defective by reason of not stating the name of the holder; nor is it defective by reason of a misdescription of the date of the note in question, provided there was no other note payable at the same place and made and indorsed by the same parties.

The case is stated in the opinion of the court.

Story, J., for the court. — This is a suit originally brought in the Circuit Court of Ohio, by the Bank of the United States, against A. G. Wood and George Ebert, doing business under the firm of Wood & Ebert, Alexander

Adair, Horace Reed, and the plaintiff in error, Peter Mills. The declaration was for $3,600, money lent and advanced. During the pendency of the suit, Reed and Adair died. Mills filed a separate plea of non assumpsit, upon which issue was joined; and, upon the trial, the jury returned a verdict for the Bank of the United States, for $4,641, upon which judgment was rendered in their favor. At the trial, a bill of exceptions was taken by Mills, for the consideration of the matter of which the present writ of error has been brought to this court.

By the bill of exceptions, it appears that the evidence offered by the plaintiffs in support of the action 'was, by consent of counsel, permitted to go to the jury, saving all exceptions to its competence and admissibility which the counsel for the defendant reserved the right to insist [upon] in claiming the instructions of the court to the jury on the whole case.'

The plaintiffs offered in evidence a promissory note, signed Wood & Ebert, and purporting to be indorsed in blank by Peter Mills, Alexander Adair, and Horace Reed, as successive indorsers, which note, with the indorsements thereon, is as follows, to wit: 'Chilicothe, 20th July, 1819. $3,600. Sixty days after date, I promise to pay to Peter Mills, or order, at the office of discount and deposit of the Bank of the United States, at Chilicothe, $3,600, for value received. Wood & Ebert.' Indorsed, 'Pay to A. Adair, or order, Peter Mills.' 'Pay to Horace Reed, or order, A. Adair.' 'Pay to the President, Directors, and Company of the Bank of the United States, or order, Horace Reed.' On the upper right-hand corner of the note is also indorsed: '3185. Wood & Ebert, $3,600, Sept. 18–21.' It was proven that this note had been sent to the office at Chilicothe, to renew a note which had been five or six times previously renewed by the same parties. It was proven, by the deposition of Levin Belt, Esq., Mayor of the town of Chilicothe, that, on the 22d September, 1819, immediately after the commencement of

the hours of business, he duly presented the said note at the said office of discount and deposit, and there demanded payment of the said note; but there was no person there ready or willing to pay the same, and the said note was not paid; in consequence of which the said deponent immediately protested the said note, for the non-payment and dishonor thereof, and immediately thereafter prepared a notice for each of the indorsers respectively, and immediately, on the same day, deposited one of said notices in the post-office, directed to Peter Mills, at Zanesville (his place of residence), of which notice the following is a copy: 'Chilicothe, 22d of September, 1819. Sir: You will hereby take notice that a note, drawn by Wood & Ebert, dated twentieth day of September, 1819, for $3,600, payable to you, or order, in sixty days, at the office of discount and deposit of the Bank of the United States at Chilicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you. Yours respectfully, Levin Belt, Mayor of Chilicothe.' (Peter Mills, Esq.). It was further proven by the plaintiffs that it had been the custom of the banks in Chilicothe, for a long time previously to the establishment of a branch in that place, to make demand of promissory notes and bills of exchange, on the day after the last day of grace (that is, on the sixty-fourth day); that the branch bank, on its establishment at Chilicothe, adopted that custom, and that such had been the uniform usage in the several banks in that place ever since. No evidence was given of the handwriting of either of the indorsers. The court charged the jury: 1. That the notice, being sufficient to put the defendant upon inquiry, was good, in point of form, to charge him, although it did not name the person who was holder of the said note, nor state that a demand had been made at the bank when the note was due; 2. That, if the jury find that there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by defendant, except the note in controversy, the mistake in

the date of the note, made by the notary in the notice given to that defendant, does not impair the liability of the said defendant, and the plaintiffs have a right to recover; 3. That, should the jury find that the usage of banks, and of the office of discount and deposit in Chilicothe, was to make demand of payment and to protest, and give notice on the sixty-fourth day, such demand and notice are sufficient.

The counsel on the part of the defendant prayed the court to instruct the jury 'that, before the common principles of the law relating to the demand and notice necessary to charge the indorser can be varied by a usage and custom of the plaintiffs, the jury must be satisfied that the defendant had personal knowledge of the usage or custom at the time he indorsed the note; and also that, before the plaintiffs can recover as the holder and indorser of a promissory note, they must prove their title to the proceeds by evidence of the indorsements on the note,' which instructions were refused by the court.

Upon this posture of the case, no questions arise for determination here, except such as grow out of the charge of the court, or the instructions refused on the prayer of the defendant's counsel. Whether the evidence was, in other respects, sufficient to establish the joint promise stated in the declaration, or the joint consideration of money lent, are matters not submitted to us upon the record, and were proper for argument to the jury.

The first point is, whether the notice sent to the defendant at Chilicothe was sufficient to charge him as indorser. The court was of opinion that it was sufficient, if there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant.

It is contended that this opinion is erroneous, because the notice was fatally defective, by reason of its not stating who was the holder; by reason of its misdescription of the date of the note; and by reason of its not stating that a demand had been made at the bank when the note was due. The first objection proceeds upon a doctrine which

is not admitted to be correct, and no authority is produced to support it. No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent that payment has been refused by the maker; that he is considered liable; and that payment is expected of him. It is of no consequence to the indorser who is the holder, as he is equally bound by the notice, whosoever he may be; and it is time enough for him to ascertain the true title of the holder when he is called upon for payment.

The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In the present case, the misdescription was merely in the date. The sum, the parties, the time and place of payment, and the indorsement, were truly and accurately described. The error, too, was apparent on the face of the notice. The party was informed that, on the 22d September, a note indorsed by him, payable in sixty days, was protested for non-payment; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances the court laid down a rule most favorable to the defendant. It directed the jury to find the notice good, if there was no other note payable in the office of Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant? If he had indorsed but one note for Wood & Ebert, how could the notice fail to be full and unexceptionable in fact?

The last objection to the notice is, that it does not state that payment was demanded at the bank when the note

became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made is matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser. In point of fact, in commercial cities, the general if not universal practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment.

Upon the point then, of notice, we think there is no error in the opinion of the Circuit Court.

GILBERT v. DENNIS.

Supreme Court of Massachusetts, March, 1842. 3 Met. 495.

Mere notice of non-payment, which does not express or imply demand and dishonor, is not such notice as will render the indorser liable.

Assumpsit by indorsee against the indorser of a negotiable promissory note. The note was payable generally. Payment at maturity having been refused, the holder caused notice to be left at the defendant's dwelling-house, which stated that the note 'is due this day and unpaid.' Defence, that the notice was not good. The judge ruled that it was good, but reserved the question for the whole court.

Shaw, C. J., for the court.— . . . . [A question of the presentment.] No particular form of notice is necessary. It may be either written or verbal. Tindal v. Brown, 1 T. R. 167. Nor will a mistake or misdescription of the

note render the notice insufficient, if on the whole it cannot mislead the indorser, and if it so designates and distinguishes the note as to leave no reasonable doubt in the mind of the indorser what note was intended, and that it was the same with the note in suit. Smith *v.* Whiting, 12 Mass. 6; Bank of United States *v.* Carneal, 2 Peters, 543.

But though no special form of notice is requisite, still in some form the fact to be notified is that the note is dishonored by the default of the promisor; and this may be done verbally or in writing, in any language which communicates the information to the indorser, in terms, or by reasonable implication. Indeed, the same formula, in terms, may communicate this information or not, according to circumstances. Suppose a note payable at a bank, in terms, or by the agreement of parties, or tacit agreement arising from usage or otherwise; it is the duty of the promisor to pay it at such bank on the last day of grace. The dishonor of such note by the promisor consists in the non-payment at the bank. If then, after the time of payment has elapsed, notice be given to the indorser that the note is unpaid, it is notice that it is dishonored; whereas, in case of a private holder, in regard to a note which requires presentment and demand to fix the holder with a default, notice, in the same words, that the note is unpaid would not necessarily imply that it was dishonored, because that fact might be strictly true, though the note had never been presented, nor presentment waived or excused.

But whatever may be the form of the notice, whether written or verbal, we think the result of the decided cases is this: that the notice should be such that it will inform the indorser that the notice has become due and been dishonored, and that the holder relies on the indorser for payment; that this information may be express, or may be inferred by necessary implication, or reasonable intendment from the language; construing such language in reference to its accustomed meaning, when applied to similar subjects, and with reference to the terms of the note,

the time and place at which the note is to be paid as fixed by express or tacit agreement, or inferred from general or particular usages. It is not necessary to inform the indorser of the time, place, or mode of presentment and demand, nor the means by which it was dishonored, nor matter of excuse or waiver. Whatever legally fixes the promisor with dishonor is sufficient, on due notice given, to charge the indorser. If, for instance, the promisor had absconded before the note is due, without having made provision for its payment, so that no presentment and demand can be made, that is a dishonor, of which the holder may, immediately after the note has become due, notify the indorser; or if the promisor has agreed that notice left at a particular place shall be deemed a good substitute, and notwithstanding notice is so left he does not make payment, this is likewise a dishonor.

But, without considering further what constitutes a dishonor, it may be useful to examine more particularly, in reference to the present case, the authorities in relation to the effect and purport of the notice to be given to an indorser. The rule is laid down in general terms by the text-writers, that notice is to be given of the fact of dishonor. Bayley states the duty of the holder. He is under an implied undertaking to every party to the bill or note, who would be entitled to bring an action on paying it, to present, in proper time, the one for acceptance and each for payment; to allow no extra time for payment, and to give notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment. Bayley, Bills, 1st Am. ed. 124.

In general, it is incumbent on the holder to give notice of the dishonor to those persons to whom he means to resort for payment; otherwise they will be discharged. Chitty, Bills, 393.

In Tindal *v.* Brown, 1 T. R. 167, and 2 T. R. 186, note, it was held that no particular form of notice was necessary, but that such notice must come from the holder of the bill

cr note, or some party to it; and that mere knowledge of the fact of non-payment, coming to the indorser from any other source, would not be sufficient. It ought to purport that the holder looks to him for payment. The court do not say, in terms, that the notice must directly, or by implication, state the fact of dishonor, but it is implied. The case decides that the holder must do an act, electing to assert his right to recover the note of the indorser, which right can only exist in case of a dishonor of the promisor. The case did not call for a decision as to what must be the tenor or purport of the notice, as to the fact of dishonor. It ought, said Mr. Justice Buller, to purport that the holder looks to him (the indorser) for payment. In regard to this, it may be remarked that, when notice is given by the holder to the indorser of the dishonor of a note, it necessarily implies that he looks to him for payment. That is the natural, and may in general be regarded as the necessary, inference from the fact of giving such notice.

This question seems not to have arisen in England until a recent period; but, since the point has been started, there has been a series of decisions on the subject. The first was Hartley *v.* Case, 4 Barn. & C. 339; s. c. 6 Dowl. & Ryl. 505. The notice from the holder was: 'I am desired to apply to you for the payment of the sum of £150, due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place.' The court held it insufficient, because it did not apprise the party of the fact of dishonor. They said, the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. This was in 1825.

The next case was that of Solarte *v.* Palmer. On a trial before Lord Tenterden, he expressed an opinion that the notice was insufficient. A bill of exceptions was taken,

and the case brought before the Exchequer Chamber, who confirmed the decision. 7 Bing. 530; 5 Moore & P. 475; 1 Cromp. & J. 417; 1 Tyr. 371. On appeal to the House of Lords, the judgment was affirmed. 8 Bligh, N. R. 371, 874; s. c. 2 Cl. & Fin. 93; 1 Bing. N. R. 194; 1 Scott, 1.

The action was brought by the assignees of a bankrupt, and the notice was given by the attorneys of the assignees. It described the bill, and stated that it had been put into their hands by the assignees, with directions to take legal measures for the recovery thereof, unless immediately paid.

In giving judgment in the Exchequer Chamber, Tindal, C. J., states the rule to be, that the notice does not require the formality of a regular protest, but it should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment. This was decided in the House of Lords, June, 1834.

The next case, I believe, is that of Boulton *v.* Welsh, 3 Bing. N. R. 688; s. c. 4 Scott, 425. The notice to the indorser was thus: 'The promissory note for £200, drawn by, etc., dated 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give you notice thereof, and request you will let me have the amount thereof forthwith.' It was strongly urged that the words *returned unpaid* would import to the understanding of mercantile men that the note had been dishonored. But the court held themselves bound by the case of Solarte *v.* Palmer, and believing this case to be within it, held the notice insufficient, although all the judges expressed their regret at the result. But they state the rule of law, as it had before been stated, that the notice should show a presentment to the maker, a demand of payment, and a refusal. As to anything further than the general rule, this case is of no authority, unless in a case where the form of notice is precisely the same. Whether in such case the words

returned unpaid would import the fact of dishonor would depend much upon the usage of each mercantile community in which they should be used, and the conventional use and meaning of particular forms of expression used in such community. This was a decision of the Court of Common Pleas, Easter Term, 1837.[1]

About the same time was decided, in the Court of Exchequer, the case of Hedger *v.* Steavenson, 2 Mees. & W. 799, where the attorney addressed a letter to the defendant, informing him that his note (describing it) became due the day before, and had been returned unpaid, and requested him to remit the amount, with 1*s.* 6*d.* noting; and the notice was held to be good.

The case of Messenger *v.* Southey, 1 Man. & G. 76, and 1 Scott, N. R. 180, was decided in the Court of Common Pleas, in 1840. The notice was as follows: 'This is to inform you that the bill I took of you for £15 2*s.* 6*d.* is not took up, and 4*s.* 6*d.* expense; and the money I must pay immediately.' Held, it was insufficient, because it did not state or intimate, by intelligible inference, that the note had been dishonored.

About the same time, the case of Lewis *v.* Gompertz, 6 Mees. & W. 399, came before the Court of Exchequer. The notice from the holder to the indorser stated that the bill bearing his indorsement had been presented to the acceptor, and returned dishonored, 'and now lies overdue and unpaid with me, as above, of which I give you notice.' This was held sufficient, as giving all the requisite information, although it did not, in terms, require payment of the indorser.

The remarks of Mr. Baron Parke, in this case, are well worthy of consideration, as showing the extent to which the court considered the authority of Solarte *v.* Palmer as going, and the qualifications with which it is to be taken.

In Grugeon *v.* Smith, 6 Adol. & Ellis, 499, the notice to

[1] Boulton *v.* Welsh was overruled in 1842 by Robson *v.* Curlewis, 2 Q. B. s. c. Car. & M. 378.

the drawer of a bill was that the bill had been returned with charges; and the immediate attention of the drawer to it was requested. This was held sufficient, as implying a demand and refusal, and noting for non-payment.

See Houlditch v. Cauty, 4 Bing. N. R. 411; s. c. 6 Scott, 209; Strange v. Price, 10 Adol. & Ellis, 125; Burgh v. Legge, 5 Mees. & W. 418; Shelton v. Brothwaite, 7 Mees. & W. 436; Cooke v. French, 3 Per. & D. 596; s. c. 10 Adol. & Ellis, 131, note.

These are all recent cases, bearing more or less directly upon the question, but do not essentially vary the result. Where, in the notice, it is stated that the bill has been noted or returned with charges of protest, or the like, it is held to be notice, by reasonable implication of the fact of dishonor.

It was contended at the argument that although it has been settled by recent authorities in England that the notice to the indorser must state the fact of dishonor, yet that the American authorities would show that it was unnecessary. It becomes, therefore, necessary to examine and compare them.

Mills, in error, v. U. S. Bank, 431 Wheat.[1] The note was in terms payable at the branch of the U. S. Bank at Chilicothe, and indorsed by the original defendant, plaintiff in error. It was demanded at the proper time at the bank, but there being no person there ready and willing to pay the same, it was immediately protested, and notice given to the defendants. The notice described the note by the date and amount, the time and place of payment, and as a note on which the defendant was indorser, and stated thus: 'which has been protested for non-payment, and the holders thereof look to you.' (Signed by the Mayor of Chilicothe acting as notary, and addressed to the defendant.) It was objected that the notice was defective, because it did not state who was the holder; because there was a misdescription of the date; and because

[1] Ante, p. 152.

it did not state that a demand had been made at the bank, when the note was due. As to the misdescription, it was held to be of no importance, if there was no other note to which it could apply, if it was so described as to indicate the note in suit, and if it did not mislead.

As to the sufficiency of the notice, the opinion was delivered by Mr. Justice Story. Some particular expressions, taken alone, would seem to warrant the position for which it is cited. But taking the whole together, and in reference to the case then before the court, we think it is not opposed to the rule as stated in the English cases. Speaking in reference to the first objection, that the notice did not state who was the holder, the judge says: 'No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent that payment has been refused by the maker; that he is considered liable; and that payment is expected of him.'

In reference to the objection that it did not state that payment was demanded at the bank when the note became due, he says: 'It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity.' He then speaks of the fact of presentment and demand as matter of fact to be proved, and adds: 'A statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded on his having complied with the requisitions of law against the indorser.' One of these requisitions is, of course, presentment and demand. And the learned judge concludes, upon this point, by adding that, 'in point of fact, the general if not universal practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment.'

In the case then before the court, the notice contained a full and precise statement of the presentment, demand, and non-payment by the maker. The objection with which the court were dealing was, that the notice did not specify

the time and place of demand. The answer made was, that such particularity was unnecessary, and that it is sufficient that it states the fact of non-payment. Applied to the facts of that case, it may be construed to mean non-payment after due presentment. So, when the learned judge speaks of the practice of commercial cities, he speaks of notice of the mere naked non-payment, in contradistinction to stating, in the notice, the mode and place of demand. That such is the meaning may be inferred from the passage before cited, in which he speaks of the object of the notice, which is to inform the indorser that payment has been refused by the maker. Refusal implies non-payment on demand, or under such circumstances as render a presentment and demand unnecessary. Indeed, in many cases, simple notice of non-payment is notice of dishonor; as where the note is in terms, or by usage or special agreement, payable at a bank, a notice stating the date and terms of the note, showing that it has become due, and averring that it is unpaid, is equivalent to an averment that it is dishonored.

In Smith *v.* Whiting, 12 Mass. 6, no question was raised as to the sufficiency of the notice. It was notice from a bank. It described the note as due and unpaid; and by usage it was held to be payable at the bank. Of course it was dishonored, by not being paid at the bank by the maker.

So in State Bank *v.* Hurd, 12 Mass. 172, notice was left at a place agreed by the parties as a substitute for notice at the house or place of business of the maker; and it was held sufficient, being equivalent to a more formal demand; and failure of the promisor to pay, on such notice, rendered the indorser liable.

The case of Bank of Rochester *v.* Gould, 9 Wend. 279, is a case of mere misdescription. The notice to the indorser stated expressly that the note had been protested for non-payment; and the only question was, whether it was well described. It therefore does not affect the present question.

The case of Bank of United States *v.* Carneal, 2 Peters, 543, may be considered as throwing some light on the subject of inquiry. It is held that when the note is payable at a bank, and the bank is itself the holder of it, no demand is necessary. It is the duty of the maker to go to the bank within the usual hours of business and pay it; and, if he fail to do so, the note is dishonored. Toward the close of the opinion, given by Mr. Justice Story, it is stated thus: 'A suggestion has been made at the bar that a letter to the indorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also informs the indorser that he is looked to for payment. But where such notice is sent by the holder, or by his order, it necessarily implies such responsibility over. The purpose may be reasonably inferred from the nature of the notice.'

We have thus attempted, at the risk of being somewhat tedious, to ascertain what the rule is upon this subject, on account of the extreme importance of certainty and uniformity in the rules of law applicable to the rights and duties of holders and other parties to notes and bills of exchange. And we take that rule to be, that as an indorser is liable only conditionally for the payment, in case of a dishonor of the note at its maturity by the maker and notice thereof to the indorser, in order to charge him, notice of such dishonor must be given him by the holder or his agent, or some party to the bill; that mere notice of non-payment, which does not express or imply notice of dishonor, is not such notice as will render the indorser liable.

In order to apply the rule thus stated to the present case, it will be necessary to look at the facts stated in the report. It appears that the presentment and demand on the promisor were made on the morning of the day on which the note fell due. Afterwards, at about eleven o'clock, the plaintiff caused a written notice to be left at the defendant's dwelling-house, of which the following is a copy: 'Boston, May 4, 1838. Mr. Louis Dennis. Sir, —

I have a note signed by C. E. Bowers and indorsed by you for seven hundred dollars, which is due this day and unpaid; payment is demanded of you. C. C. Gilbert.'

This notice comes from an individual, not from a bank. It was delivered at eleven A. M. There would then be no default and no dishonor, unless a demand had been made on the promisor. An averment, therefore, that it was unpaid did not, by necessary implication or reasonable intendment, amount to an averment or intimation that payment had been demanded and refused, or that the note had been otherwise dishonored. The court are therefore of opinion that the notice was not sufficient to render the indorser legally liable.

CHAPMAN v. KEANE.

King's Bench of England, Easter, 1835. 3 Ad. & E. 193.

The holder of a bill may avail himself of notice of dishonor given in due time by any party to the bill (whose liability may be fixed by notice).

Assumpsit by indorsee against drawer of a bill of exchange, averring in the usual form presentment to the drawee, non-payment by him, and notice to the defendant. Plea, that the defendant had not due notice of non-payment by the drawee, tendering issue thereon. Joinder.

On the trial before Tindal, C. J., at the Guildford Summer assizes, 1834, it appeared that the plaintiff had indorsed the bill, before it was due, to one Wiltshire, who left it with the plaintiff's clerk in order that it might be presented at maturity to the drawee. It was dishonored upon presentment; whereupon the plaintiff's clerk gave notice to the defendant. The notice was regular in all respects except that the clerk gave it in the name of the plaintiff, the indorsee, and not of Wiltshire. The plaintiff afterwards took up the bill from Wiltshire. It was objected that the notice ought to have been given by the

holder of the bill, whereas the holder, at the time of the notice, was Wiltshire. His lordship, being of the same opinion, nonsuited the plaintiff. In Michaelmas term last, Law obtained a rule to show cause why the nonsuit should not be set aside and a verdict entered for the plaintiff.

Lord Denman, C. J., for the court. — On the trial of this action by the indorser against the drawer of a bill of exchange the Lord Chief Justice of the Common Pleas directed a nonsuit, for want of due notice of dishonor. The bill had been indorsed by the plaintiff, by the desire of Wiltshire, who had discounted it and left it in the hands of the plaintiff's clerk with instructions to obtain payment or give notice of dishonor. He did give notice to the defendant, but in the name of the plaintiff, not in that of Wiltshire, the then holder, who had deposited the bill with him.

The objection to the plaintiff's recovery was founded on the case of Tindal *v.* Brown, 1 T. R. 167, s. c. 2 T. R. 186, in which all the judges except Lord Mansfield considered a notice by one who was not the holder as no notice, on the ground that the drawer was not thereby apprised of the holder's intention to look to him for payment; and this case was distinctly recognized, and its principle adopted, by Lord Eldon in Ex parte Barclay, 7 Ves. 597.

Notwithstanding these high authorities, it is clear from Jameson *v.* Swinton, 2 Camp. 373, Wilson *v.* Swabey, 1 Stark. 34, and also from the learned treatises on bills of exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled as holder to sue upon the bill may avail himself of notice given in due time by any party to it. In the nisi prius cases just referred to no express allusion was made to Tindal *v.* Brown or Ex parte Barclay; but we can hardly conceive that they were not present to the recollection of

Lord Ellenborough and Mr. Justice Lawrence or the counsel engaged. These learned judges, indeed, decided them at nisi prius, but without question. We are now compelled to determine whether the case of Tindal *v.* Brown, as to this point, be good law. We think that it is not. If it were, the holder might secure his own right against his immediate indorser by regular notice; but the latter, and every other party to the bill, would be deprived of all remedy against anterior indorsers and the drawer, unless each of those parties should in succession take up the bill immediately on receiving notice of dishonor, a supposition which cannot be reasonably made. We may add that this point was not necessary for the decision of the case,[1] as this court, including Lord Mansfield, granted a new trial on a different ground.

Rule absolute.

SHOENBERGER *v.* THE LANCASTER SAVINGS INSTITUTION.

Supreme Court of Pennsylvania, 1857. 28 Penn. St. 459.

It is not necessary that an executor of an indorser of a note should have qualified as such to justify the holder of the paper in sending notice of dishonor to him.

Action upon several negotiable promissory notes indorsed by the defendants' testator. The defendants were named (with others) as executors in the testator's will, but did not qualify or act as such. After the present action, but not before, they renounced (the others having qualified under) the appointment made by the testator. The notes were dishonored at maturity and two of the defendants were in due season notified of the fact. Judgment for the plaintiffs. Writ of error, on the ground that the notice of dishonor to the defendants was insufficient to bind the testator's estate.

[1] Tindal *v.* Brown, *supra.*

LOWRIE, J., for the court. — The office of executor in Pennsylvania is of course very analogous to the office of executor in England, but their duties are not identical; and we always run the risk of error if we take counsel from English analogies and overlook the instructions of our own statutes. At death a man's estate really passes into the hands of the law for administration, as much when he dies testate as when intestate; except that, in the former case, he fixes the law of its distribution after payment of debts, and usually appoints the persons who are to execute his will. But even this appointment is only provisional, and requires to be approved by the law before it is complete; and therefore the title to the office of executor is derived rather from the law than from the will.

The law, however, allows a man to appoint his executors subject to this approval, and treats them, when appointed, as entitled to the office until they renounce it, if they are not legally incompetent to fill it. If they are competent, their appointment avails to make them representatives of the estate so far as relates to acts in which they are merely passive, such as receiving notice of the dishonor of a note; for they have immediate power to qualify themselves to act if they choose, and if the occasion demands it.

When the notices in this case were served, the two persons named as executors and to whom notice was given, had power to take the oath and the office of executors, and might have done so the next hour afterwards. The law allowed the testator to appoint them, and he did so, and they may be treated as representing his estate for the purpose of such notice, unless they renounced at the register's office, or at least until they refuse the notice on the ground that they do not intend to serve. He who is bound to give such notice is not in fault in giving it to one who is thus potentially an executor, even though others have already become so actually by taking the oath of office, unless at least he is warned that such notice is not accepted. If

the estate suffers from such a notice, it is not the fault of him that gave it.

It was not erroneous to give the notice on the 4th of July, for a statute expressly allows this.

Judgment affirmed.

BOWLING v. HARRISON.

Supreme Court of the United States, December, 1847. 6 How. 248.

If the parties reside in the same city or town, the indorser is entitled to personal notice of the dishonor of the bill or note. Notice by the mail in such case is not sufficient.

Writ of error, on instructions to the jury, who found for the defendant. The action was by the indorsee against an indorser of a promissory note, on which was a memorandum in these words, referring to the defendant, 'Third indorser, J. P. Harrison, lives at Vicksburg.' The owner of the note at maturity lived in Maryland, the defendant at said Vicksburg, in Mississippi. The note was sent by the owner to the Planters' Bank of Vicksburg for collection. It was duly presented for payment and dishonored; and notice was then left in the post-office addressed to the defendant, but not received by him. The errors complained of appear in the opinion.

GRIER, J., for the court. — The first assignment of error in this case is to the instruction given by the court to the jury, 'that, to charge an indorser, if he lived in the town in which the note was made payable, the notice must be personal, unless he had agreed to receive it elsewhere, or unless, by custom and usage of the bank at which the note is payable, the notice of non-payment was left at the post-office.'

As the only question on the trial of the cause was the sufficiency of notice left at the post-office at Vicksburg, to charge an indorser residing there, and not whether a copy

left at his dwelling-house or place of business would be proper, the phrase 'personal notice' was evidently intended and understood to include the latter in opposition to the former. This instruction is, therefore, not objected to on the ground of any inaccuracy of expression on that point. But the complaint is, that the rule of law on this subject was erroneously enunciated by the court, in stating the conditions under which a personal service of notice on an indorser is required to be 'residence in the town where the note was made payable.'

It is true, the terms in which the rule of law on that subject is usually stated differ from those used by the court on this occasion. In Williams *v.* United States Bank, 2 Peters, 96, 101, it is thus stated by this court: 'If the parties reside in the same city or town, the indorser must be personally noticed of the dishonor of the bill or note, either verbally or in writing, or a written notice must be left at his dwelling-house or place of business.' Mr. Justice Story, Story, Bills, § 312, states the rule in these words: 'Where the party entitled to notice and the holder reside in the same town or city, the general rule is, that the notice should be given to the party entitled to it, either personally or at his domicile or place of business.'

The indorsee or owner of the note, in this case, resided in Maryland, and the indorser in Vicksburg; and it is contended that, as they are the only parties, and do not reside in the same place, the rule is inapplicable to the case. But we are of opinion that, whether we regard the reasons upon which this rule is founded, or a correct construction of the terms in which it is usually stated, the instruction given by the court below was correct, and not such as to mislead the jury in the application of the law to the circumstances of the case before them.

The best evidence of notice is proof of personal service on the party to be affected by it, or by leaving a copy at his dwelling. Depositing a notice in the post-office affords but presumptive evidence of its reception, and is permitted to be

substituted for the former only where the latter would be too inconvenient or expensive. Hence, when the convenience of the public post is not needed for the purpose of transmission or conveyance, there is no reason for its use, or for waiving the more stringent and certain evidence of notice; and, therefore, in the practical application of the rule, the relative position of the person giving the notice and the party receiving it forms the only criterion of the necessity for relaxing it.

A very large portion of the commercial paper used in this country is similar to that which is the subject of the present suit. They are notes made payable at a certain bank. The last indorsee or owner transmits it to that bank for collection; if funds are not deposited there to meet it when due, it is handed to a notary or agent of the bank, who makes demand and protest, and gives notice of its dishonor to the indorsers; if they live in the same town or city where the bank is situated and the demand made, and 'where the note was payable,' he serves it personally, or at their residence or place of business; if they live at a distance, so that such a service would be inconvenient and expensive, he sends the notice by mail to the nearest post-office, or such other place as may have been designated by the party on whom it is to be served. This is and has been the daily practice and construction of the rule in question over the whole country, and the only one consonant with reason.

This practical application of the rule is correctly stated by the court in their instruction to the jury as connected with the circumstances of the case before them, and also within its terms as it is usually stated in the books. The term 'holder' is properly applied to the person having possession of the paper and making the demand, whether in his own right or as agent for another. The Planters' Bank of Vicksburg were the 'holders' of this note for collection, and were bound to give notice to all the indorsers. Smedes v. The Utica Bank, 20 Johns. 372. The notary, also, who held the note as agent of the owner, for the pur-

pose of making demand and protest, may be properly considered as the 'holder' within the letter and spirit of this rule. On a careful examination of the very numerous cases in the books, in which the rule under consideration has been enunciated in the terms above stated, they will be found not essentially to differ from the present in their circumstances. In some instances, also, the rule has been stated in the terms used by the court below. See Bayley, Bills.

An exception is taken, also, to the instruction of the court, 'that the memorandum attached to the note in this case was not a sufficient agreement to receive notice at the post-office, and to dispense with personal notice on the indorser; and that the custom and usage of the bank, as proved in this case, were not sufficient to dispense with personal notice.'

The memorandum is in the following words: 'Third indorser, J. P. Harrison, lives at Vicksburg.' The only direct evidence of usage was, 'that, for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg to have notice served personally upon the indorsers resident in Vicksburg, unless there was a memorandum on the note designating a place where notice was to be served; then the notice was left at such place.' This is, in fact, no usage peculiar to Vicksburg, but the general rule of commercial law. The notary appears to have mistaken this memorandum for an agreement to receive notice at the Vicksburg post-office; and, however willing to excuse himself, he has not ventured to swear directly that there was any known usage to justify this construction, or rather misconstruction, of this memorandum. The counsel for plaintiff in error complain that the court did not submit it to the jury to say whether an inference might not be drawn, from some equivocal or obscure expressions of the witness, that there was such a usage.

It is true, the jury are the proper judges of the credibility and weight of testimony, but the court should not instruct them to presume or infer important facts, unless there

be testimony which, if believed, would justify such a conclusion.

It is of the utmost importance to commercial transactions that the rules of law on the subject of notice which is to charge an indorser be stable and certain, and not suffered to fluctuate and vary with the notions or caprice of banking corporations or village notaries. A usage, to be binding, should be definite, uniform, and well known. It should be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract. Every day's experience shows that notaries, in many places, fall into loose ways of performing their duties, either through negligence or ignorance; and courts should be cautious how they encourage juries to presume usages and customs contrary to the settled rules of law, in order to sanction the mistakes or misconceptions of careless or incompetent officers. It was as easy to have written the memorandum on this note: 'The indorser, J. P. Harrison, agrees to receive notice at the Vicksburg post-office,' as to write it in its present form; and one can hardly conceive of the possibility of a well-known and established usage, that a written memorandum should be construed without any regard to its terms or plain meaning. Those who affirm the existence of such a strange usage should be held to strict proof of it; and the court were right in not submitting it to the jury to infer such an improbable and unreasonable custom, by forced or astute construction of equivocal expressions from a willing witness.

Let the judgment be affirmed.

MUNN *v.* BALDWIN.

Supreme Court of Massachusetts, March, 1810. 6 Mass. 316.

Putting a letter into the post-office, directed to the indorser of a bill of exchange, and containing notice of ~~protest~~ dishonor for non-payment, is sufficient, though it does not appear that the letter was ever received.

Assumpsit upon a bill of exchange drawn in Boston on Justin Smith, of Philadelphia, in favor of the defendants, and by them indorsed to the plaintiff.

The facts (agreed) were, that the notary in Philadelphia, who protested the bill for non-payment, on the day of the protest, or on the morning of the next day, before the mail for Boston was closed, put a letter into the post-office in Philadelphia directed to the defendants in Boston, and containing the necessary notice; but the case adds: 'It does not appear that the defendants ever received that letter.'

PARSONS, C. J. The only question in this action is, whether the defendants had legal notice of the protest for non-payment of the bill of exchange. After taking a little time to advise, we are all of opinion that the notice is prima facie sufficient. The holder of the bill made use of the usual mode of conveying notice, by putting the letter containing it into the post-office; and a mode to which the indorsers must be considered as assenting, or the negotiating of bills payable at a distance would be greatly embarrassed, if not obstructed. For who would buy a bill, to be presented for payment in a remote part of the United States, if it was to be understood that if not paid, he must be at the expense of some private messenger, whose accidental sickness or detention on the road would defeat his remedy?

When a letter is put into the regular post-office, we presume that it was sent and received agreeably to its direction, unless the contrary is proved. Here there is no evidence on that point; the case only stating, that it does not appear that

the letter was received by the defendants; and yet they might, in fact, have received it. If it was agreed that the letter miscarried, and that the defendants did not receive it, it might be a question at whose risk the letter was sent by the mail; and whether, the regular mail being the method of conveyance assented to by the defendants, they must not be answerable for the miscarriage, in the same manner as if a letter sent by their private servant had not been delivered by him. On this last point, however, it is not necessary now to decide. But on the facts stated, we are satisfied that the notice must be considered as sufficient to make the indorsers liable, and that the plaintiff ought to recover.

Therefore, conformably to the agreement of the parties, let the defendants be called.

BANK OF ALEXANDRIA v. SWANN.

Supreme Court of the United States, January, 1835. 9 Peters, 33.

Notice of the default of the maker of a note put into the post-office early enough to be sent by the mail of the succeeding day, is seasonable.

The case is stated in the opinion of the court.

THOMPSON, J. This suit was brought in the Circuit Court of the District of Columbia, for the County of Alexandria, upon a promissory note made by Humphrey Peake, and indorsed by the defendant in error. Upon the trial the jury found a special verdict, upon which the court gave judgment for the defendant, and the case comes here upon a writ of error.

The points upon which the decision of the case turns resolve themselves into two questions:

1. Whether notice of the dishonor of the note was given to the indorser in due time;

2. Whether such notice contained the requisite certainty in the description of the note.

The note bears date on the twenty-third day of June, 1829,

and is for the sum of $1,400, payable sixty days after date at the Bank of Alexandria. The last day of grace expired on the 25th of August, and on that day the note was duly presented, and demand of payment made at the bank, and protested for non-payment; and on the next day notice thereof was sent by mail to the indorser, who resided in the city of Washington.

The general rule, as laid down by this court in Lenox *v.* Roberts, 2 Wheat. 373, 4 Cond. 163, is, that the demand of payment should be made on the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day. The special verdict in the present case finds, that according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail before half-past eight o'clock P.M., at Alexandria, would leave there some time during that night, and would be deliverable at Washington the next day, at any time after eight o'clock A.M., and it is argued on the part of the defendant in error, that as demand of payment was made before three o'clock P.M., notice of the non-payment of the note should have been put into the post-office on the same day it was dishonored, early enough to have gone with the mail of that evening. The law does not require the utmost possible diligence in the holder in giving notice of the dishonor of the note; all that is required is ordinary reasonable diligence: and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business. In the case of the Bank of Columbia *v.* Lawrence, 1 Peters, 578, 583, it is said by this court to be well settled at this day, that when the facts are ascertained, and are undisputed, what shall constitute due diligence is a question of law; that this is best calculated for the establishment of fixed and uniform rules on the subject, and is highly important for the safety of holders of commercial paper. The law, generally speaking, does not regard the fractions of a day; and, although the demand of payment at the bank was required to be made during banking hours, it

would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject. If the time of sending the notice is limited to a fractional part of a day, it is well observed by Chief Justice Hosmer, in the case of the Hartford Bank *v.* Stedman & Gordon, 3 Conn. 489, 495, that it will always come to a question, how swiftly the notice can be conveyed. We think, therefore, that the notice sent by the mail, the next day after the dishonor of the note, was in due time.

LAWSON *v.* THE FARMERS' BANK OF SALEM.

Supreme Court of Ohio, January, 1853. 1 Ohio St. 206.

To charge an indorser of a bill who resides in another place, the holder *may* send the notice by the mail of the day of default, but if he does not, he *must* deposit the letter containing the notice, directed to the indorser, in the post-office in time to be sent by the mail of the day next after the day of the dishonor, unless the mail of that day be made up and closed before early business hours; and if there be no mail on that day, or if the mail close before early business hours, then by the next practicable mail.

The holder of a bill is not bound to give notice of the dishonor to more than one indorser; and this and every other indorser has the same time for giving notice to prior parties that the holder has.

After an agent to whom a bill is sent for collection has given notice to the principal, the same time is allowed to the principal for giving notice as if he had himself been an indorser receiving notice from the holder.

Error to the Court of Common Pleas of Columbiana County, reserved in the District Court for decision by the Supreme Court.

The original action was assumpsit for recovery against Lawson & Covode, as indorsers of a bill of exchange in the following form: 'Waterville, April 25, 1848, $4,000. Ninety days after date, pay to the order of Lawson & Covode four thousand dollars, value received, and place the same to the account of yours, etc., W. F. Jordan. To J. Jordan & Son,

Pittsburgh.' Indorsed: 'Pay to Farmers' Bank of Salem. Lawson & Covode.' Accepted by 'J. Jordan & Son.'

The declaration counts upon the instrument, and also contains the common counts. Plea, non assumpsit.

It appears that this bill, which was drawn and indorsed in this State, was discounted by the Bank of Salem, and the money paid to the acceptors thereof. Subsequently it was indorsed by the Bank of Salem to the Exchange Bank of Pittsburgh for collection, Jordan & Son living in that city. It matured in the hands of the Exchange Bank of Pittsburgh on the twenty-seventh day of July, 1848, and being dishonored by the acceptors in Pittsburgh was protested for non-payment by a notary.

On the trial of the cause in the Common Pleas, the bank gave the bill in evidence, and the protest attached thereto, dated July 27, 1848, also a certified copy of the notarial record of the notary, with proof of his death since the protest of the bill. The defendants below objected to this last testimony, but the court admitted it. During the trial the bank called J B and J D as witnesses, both being stock-holders and directors of the Salem Bank not only at that time but also when the bill was discounted and reached its maturity. Their testimony was objected to, but received.

The bank having rested, the defendants below gave in evidence the notice of protest sent to the Salem Bank by the notary, and produced by the cashier of the Salem Bank. And evidence having been given that the Exchange Bank of Pittsburgh closed at three o'clock P.M. on the 27th July, 1848; that the notary's office was about one square from the Pittsburgh post-office; that the mail left Pittsburgh for Salem at ten o'clock A. M. on the 28th of July, and was closed at ten minutes after nine o'clock A. M.; and that the business hours of Pittsburgh were from seven o'clock A. M. till dusk, — the parties rested. The notarial protest does not state when the notices were deposited in the post-office; but the notice to the Salem Bank, which covered the notice to Lawson & Covode, the accommodation in-

dorsers, is mail-marked at the Pittsburgh post-office, July 29, 1848.

Instructions to the jury were objected to by the defendants, and the jury returned a verdict for the plaintiff for $4,513.33.

BARTLEY, J., (after considering the question of the competency of the witnesses, J B and J D). Touching the second question, then, did the Court of Common Pleas err in charging the jury that, if the notice to the indorsers of the demand and non-payment of the bill was deposited in the post-office at Pittsburgh *at any time* during the day after the day of dishonor, without regard to the time of the departure of the mail for that day, it would be sufficient notice; and, moreover, that if it was found inconvenient to deposit the notice in the post-office in time for the mail of that day, it was in proper time if the notice was deposited in time to be sent off by the next mail of the day next after the day following the day of the dishonor of the bill?

This involves a very important question of the law merchant, and it is not a little surprising that there should remain any doubt or uncertainty, at this late day, upon a question of such vital importance to the interest of commercial countries, respecting the duties and liabilities of holders and parties to dishonored paper. And it is a matter of no small moment, that a question which enters so largely as does this into the every-day business transactions of different commercial states and countries should be settled, not only upon a certain and unvarying, but also upon a uniform basis.

The liability of the indorser is strictly conditional, dependent both upon due demand of payment upon the maker or acceptor, and also due and legal notice of the non-payment. The purpose and object of such demand and notice is to enable the indorser to look to his own interest, and take immediate measures for his indemnity.

The demand and notice being conditions precedent to the indorser's liability, it is incumbent on the holder to make clear and satisfactory proof of them before he can recover. The plaintiffs in error in this case, being accommodation indorsers, may well insist upon strict proof of due diligence in giving notice of the dishonor of the bill.

The law does not require the utmost diligence in the holder, in giving notice of the dishonor of a bill or note. All that is requisite is ordinary or reasonable diligence. And this is not only the rule and requirement of the law merchant, but a statutory provision of this State. But what amounts to due diligence or reasonable notice is, when the facts are ascertained, purely a question of law, settled 'with a view to practical convenience, and the usual course of business.'

The question was at one time strenuously contested, whether due diligence did not require that, where the parties reside in the same place, the notice of non-payment should be given on the day of the dishonor of the bill; and where the parties reside in different places, should be sent by the mail of that day, or the first possible or practicable mail after the default. Tindal *v.* Brown, 1 T. R. 167; Darbishire *v.* Parker, 6 East, 3; Marius, Bills, 24. But the rule was established and is supported by the great weight of authority, that, where the parties reside in different places, and the post is the mode of conveyance adopted, although it was in no case necessary to send the notice by the post of the same day of the dishonor, or of the knowledge of the dishonor, — the holder being entitled to the whole of that day, being the day of the dishonor, or knowledge of the dishonor, to prepare his notice, — yet that the notice would be insufficient unless put into the post-office in time to go by the next mail after that day. And this is in conformity with the rule laid down by Mr. Chitty in his learned treatise on Bills of Exchange, in the following explicit language: 'When the parties do not reside in the same place, and the notice is to be sent by

general post, then the holder or party to give the notice must take care to forward notice by the post of the next day after the dishonor, or after he receives notice of such dishonor, whether that post sets off from the place where he is early or late; and if there be no post on such next day, then he must send off notice by the very next post that occurs after that day.' Chitty, Bills, 485.

This is in accordance with the rule as settled by the Supreme Court of the United States. In Lenox *v.* Roberts, 2 Wheat. 373, Chief Justice Marshall says: 'It is the opinion of the court that notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the day succeeding the last day of grace.' And in the case of the Bank of Alexandria *v.* Swann, 9 Peters, 33, Mr. Justice Thompson approved of the general rule laid down in the case of Lenox *v.* Roberts, holding that notice of the dishonor need not be forwarded on the last day of grace, but should be sent by the mail of the next day after the dishonor.

The same rule was adopted by Mr. Justice Washington in the case of the United States *v.* Parker's Administrators, 4 Wash. 465; and in which case subsequently that decision was affirmed on error by the Supreme Court, 12 Wheat. 559. The same rule received the sanction of Mr. Justice Story, in the case of the Seventh Ward Bank *v.* Hanrick, 2 Story, 416, although, in the case of Mitchell *v.* Degrand, 1 Mason, 180, he appears to have been disposed to even greater strictness, holding that when a bill is once dishonored, the holder is bound to give notice by the next practicable mail, to the parties whom he means to charge for the default. This, however, is explained by Mr. Justice Washington in the case of United States *v.* Parker's Administrators, to mean that the notice should be put into the office in time to be sent by the mail of the succeeding day. This rule, adopted by the Supreme Court of the United States, and which is supported by the great weight of authority in England and in the several States of the

Union in which the question appears to have been settled by reported adjudications, is subject to some qualification, relaxing its rigor. If two mails leave the same day on the route to the place of the residence of the indorser, it is sufficient to deposit the notice in the post-office in time to go by either mail of that day, inasmuch as the fractions of the day are not counted. Whitewell *v.* Johnson, 17 Mass. 449, 454; Howard *v.* Ives, 1 Hill (N. Y.), 263.

And for the reason that the mail of the day succeeding the day of the default may go out in some places soon after midnight or at a very early hour in the morning, and is sometimes made up and closed the evening preceding, it has been adjudged that, inasmuch as the holder is allowed till the day after the day of default to send off the notice, reasonable diligence would not require him to deposit the notice in the post-office at an unreasonably early hour, or before a reasonable time can be had for depositing the notice in the post-office after early business hours of that day. The rule, as qualified and settled by the late authorities, and which I take to be the correct one, is that where the parties reside in the same place or city, the notice *may* be given on the day of default; but if given at any time before the expiration of the day thereafter, it will be sufficient; and when the parties reside in different places or States, the notice *may* be sent by the mail of the day of the default; but if not, it *must* be deposited in the office in time for the mail of the next day, provided the mail of that day be not made up and closed at an unreasonably early hour. If, however, the mail of that day be closed before a reasonable time after early business hours, or if there be no mail sent out on that day, then it must be deposited in time for the next possible post. In the case of Downs *v.* The Planters' Bank, 1 Sm. & M. 261, and also the case of Chick *v.* Pillsbury, 24 Me. 458, the doctrine on this subject has been more fully examined than perhaps in any of the older cases; and the rule adopted is that the notice, in order to

charge the indorser living in another place or State, *must* be deposited in the post-office in time to be sent by the mail of the day succeeding the day of the dishonor, providing the mail of that day be not closed at an unreasonably early hour, or before early and convenient business hours. And this rule is well sustained by authority. Fullerton *et al. v.* The Bank of the United States, 1 Peters, 605, 618; Eagle Bank *v.* Chapin, 3 Pick. 180, 183; Talbot *v.* Clark, 8 Pick. 51; Carter *v.* Burley, 9 N. H. 559, 570; Farmers' Bank of Maryland *v.* Duvall, 7 Gill & Johns. 79; Freemans' Bank *v.* Perkins, 18 Me. 292; Mead *v.* Engs, 5 Cowen, 303; Sewall *v.* Russell, 3 Wend. 276; Brown *v.* Ferguson, 4 Leigh, 37; Dodge *v.* Bank of Kentucky, 2 Marshall, 610; Hickman *v.* Ryan, 5 Littell, 24; Hartford Bank *v.* Steedman, 3 Conn. 489; Brenzer *v.* Wightman, 7 Watts & S. 264; Townsley *v.* Springer, 1 La. 122; Bank of Natchez *v.* King, 3 Robinson, 243; Brown *v.* Turner, 1 Ala. 752; Lockwood *v.* Crawford, 18 Conn. 361, 363; Bayley, Bills, 262; Story, Promissory Notes, § 325; and Byles, Bills, 160.

Some obscurity and uncertainty have been created on this subject by the expression used in some of the cases, and by some of the elementary writers, that the holder or person giving the notice has 'one day' or 'an entire day' in which to give the notice after the day of the dishonor. The term 'one day' or 'an entire day' seems not to have been used always in the same sense; and the confusion appears to have, in part, arisen from the fact that, where the parties reside in the same place, notice at any time before the expiration of the day after the day of the default will be sufficient, while, where the parties reside in different places, the notice must frequently be mailed early in the day to be in time for the mail of that day.

The defendant in error relies upon the doctrine laid down in the elementary works of Chancellor Kent and Mr. Justice Story, as fully sustaining the charge of the court below. Inasmuch as precision and certainty in the

settlement of this rule are of very great importance, a careful examination of the subject seems to be required.

Chancellor Kent, whose accuracy in his Commentaries on American Law is never to be questioned without grave consideration, in the late editions of his works, 3 Kent's Com. 106, states the rule as follows: —

'According to the modern doctrine the notice must be given by the first direct and regular conveyance. This means the first mail that goes after the day next to the third day of grace, so that, if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may, indeed, be sent on Thursday, but must be put into the post-office or mailed on Friday, so as to be forwarded as soon as possible thereafter.'

And in a note by the learned author, explanatory of the text, it is said that —

'The principle that ordinary, reasonable diligence is sufficient, and that the law does not regard the fractions of the day in sending notice, will sustain the rule as it is now generally and best understood in England, and in the commercial part of the United States, that notice put into the post-office on the next day at any time of the day, so as to be ready for the first mail that goes thereafter, is due notice, though it may not be mailed in season to go by the mail of the day next after the day of the default.'

Several cases are cited by the learned author, but they do not sustain his position. The case of Jackson *v.* Richards, 2 Caines's Cases, 343, referred to, is not in point. Haynes *v.* Birks, 3 Bos. & Pul. 599, decides that where the note fell due on Saturday, the notice sent by the post on Monday was sufficient. Sunday being excluded and not taken into the account, the notice was sent by the post of the next legal day. In the cases of Bray *v.* Hadwen, 5 Maule & Sel. 68, and Wright *v.* Shawcross, 2 Barn. & Ald. 501, it was decided that the notice, having arrived on Sunday, was to be considered as having been received on Monday, and then the party had till Tuesday, the next

post-day, for giving the notice. In Geill *v.* Jeremy, 1 M. & M. 61, where no mail went out on the day next after the day of the default, it was held that the requirement being an impossible one on that day, a notice sent by the next succeeding mail-day would be in season. The case of Firth *v.* Thrush, 8 Barn. & C. 387, turned upon the question whether the attorney employed to ascertain the residence of the defendant should be allowed a day to consult his client after information of the defendant's residence. And Lord Tenterden said: 'If the letter (giving information of the defendant's residence) had been sent to the principal, he would have been bound to give notice on the next day.' The only other case referred to is that of Hawkes *v.* Salter, 4 Bing. 715; and this is the only one which even tends to sustain the position of the learned author. In that case, the bill was dishonored on Saturday, and the mail left at half-past nine o'clock on Monday morning; and an unsuccessful attempt was made to prove that the notice was put into the post-office on Tuesday morning. Best, C. J., expressed himself clearly of opinion 'that it would have been sufficient if the letter had been put into the post-office before the mail started on the Tuesday morning; but that there was no sufficient evidence that it had been put in even on Tuesday morning.' The opinion in this case was, therefore, a mere dictum, which determined nothing, the case being decided upon a different ground.

But the position of Chancellor Kent, above referred to, is in direct conflict with the rule as laid down by himself in the first edition of his work. In the edition of 1828, 3 Kent's Com. 73, the rule is stated in these words: —

'According to the modern doctrine, the notice must be given by the first direct, regular conveyance. This means the first convenient and practicable mail that goes on the day next to the third day of grace; so that, if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may, indeed, be sent on

Thursday, but must be sent by the mail that goes on Friday.'

In the last edition of this work, published in 1851, the editor, Mr. William Kent, admits the weight of authority to be in favor of the rule as laid down in Chick *v.* Pillsbury and Downs *v.* Planters' Bank, above referred to, and he says that —

'The opinion of Best, C. J., in 4 Bing. 715, is the only one that sustains the rule suggested; and that the observations of Mr. Justice Story were too latitudinarian in allowing the entire whole day next after the dishonor.'

It is true that Mr. Justice Story, in his work on Bills of Exchange, § 291, says that an indorser need not give notice to his antecedent indorser till twenty-four hours have elapsed after the receipt of his own notice of the dishonor. And in his note to § 290 of the same work, the author says that —

'The rule does not appear to be so strict as it is laid down by Mr. Chitty, and that it would be more correct to say that the holder is entitled to one whole day to prepare his notice, and that, therefore, it will be sufficient, if he sends it by the next post that goes after twenty-four hours from the time of the dishonor,' etc.

And he adds: 'I have seen no late case which imports a different doctrine. On the contrary, they appear to me to sustain it; but, as I do not know of any direct authority which positively so decides, this remark is merely propounded for the consideration of the learned reader.'

It is not necessary here to inquire whether the position taken by the learned author is in conflict with the decisions made by himself in 1 Mason, 180, and 2 Story, 416, above referred to. In his same work on Bills of Exchange he has stated the rule with great precision and accuracy in the following language, in § 382: —

'In all cases where notice is required to be given, it is sufficient, if the notice is personal, that it is given on the day succeeding the day of the dishonor, early enough for

the party to receive it on that day. If sent by the mail, it is sufficient if it is sent by the mail of the next day, or the next practicable mail.' And in § 288: 'If the post or mail leaves the next day after the dishonor, the notice should be sent by that post or mail, if the time of its closing or departure is not at too early an hour to disable the holder from a reasonable performance of the duty. So that the rule may be fairly stated in more general terms to be, that the notice is in all cases to be sent by the next practical post or mail after the day of the dishonor, having a due reference to all the circumstances of the case.'

The same learned author has laid down the rule very fully to the same effect in his work on Promissory Notes, § 324.

The statement of the rule in the last extract is consistent with the doctrine established by the Supreme Court of the United States, and fully sustained by authority.

The discrepancies which have arisen on this subject appear to have grown out of an inaccurate use, in some of the books and decisions, of the terms 'his day,' 'an entire day,' and 'a whole day,' etc., these phrases being at one time understood or taken literally, and at another time to mean a space of time equal to a full day. If these phrases are to be taken to mean the duration of a full day, instead of the day itself, in their general application, the effect would be to change and break down numerous well-settled and useful rules. The law, as a general thing, does not have regard to the fractions of a day, and thus compel parties to resort to nice questions of the sufficiency of a certain number of hours or minutes, and to the taking of the parts of two different days to make up what may be considered in one sense a day, because equal in duration to one entire day. If this were the case, the indorser, after having been notified, would often be unable to determine whether he had been notified in season or not, until he had learned the hour of the day when the default occurred; and the holder would have it in his power at times of

affecting injuriously the right of the indorser to an early notice, by delaying the presentment until a late hour in the day. Nothing more could have been intended by the use of these phrases than that each party should have a specified day upon which the act enjoined upon him should be performed. This is the sense in which Lord Ellenborough used it in the case of Smith *v.* Mullett, 2 Camp. 208, when he said: 'If a party has an entire day, he must send off his letter conveying the notice within post-time of that day.' And, it is said by a learned elementary authority, 'If a party has an entire day, he must send off his letter conveying the notice of the dishonor of the bill within post-time of that day.' Byles, Bills, 161.

The rule laid down in Smith's Mercantile Law, to which the defendant in error has referred, will not, as I apprehend, be found on close examination to be at variance with the doctrine here adopted. Smith's Mercantile Law, 310.

It is claimed, on behalf of the plaintiffs in error in this case, that the notice of the dishonor of the bill should have been sent immediately to them, instead of being sent, as it was in the first place, to the Bank of Salem. The holder is not bound to give notice of the dishonor to any more than his immediate indorser; and each party to a bill has the same time after notice to himself for giving notice to other parties beyond him that was allowed to the holder after the default. Sheldon *v.* Benham, 4 Hill (N. Y.), 129; Eagle Bank *v.* Hathaway, 5 Met. 213. And when a bill is sent to an agent for collection, the agent is required simply to give notice of the dishonor in due time to his principal; and the principal then has the same time for giving notice to the indorsers after such notice from his agent as if he had been himself an indorser, receiving notice from a holder. Bank of the United States *v.* Davis, 2 Hill (N. Y.), 452; Church *v.* Barlow, 9 Pick. 547. The party in this case, therefore, was not at fault by sending the notice directly to the Bank of Salem, leaving that bank to send the notice to the plaintiffs in error.

Applying the rule, therefore, which we have adopted as the correct one, to this case, it was incumbent on the plaintiff below, in order to be entitled to a recovery, to show that the notice of the dishonor of the bill was deposited in the post-office in Pittsburgh in time to be sent by the mail of the twenty-eighth day of July. Ten minutes past nine o'clock in the morning was not an unreasonably early hour, or before a reasonable and convenient time after the commencement of early business hours of the day. The neglect, therefore, to send the notice by the mail of the next day after the day of the default operated to discharge the plaintiffs in error as indorsers, unless from some other cause notice had been dispensed with or rendered unnecessary. And for the charge of the Court of Common Pleas to the jury to the contrary, the judgment is reversed, and the cause remanded for further proceedings. *Judgment of Common Pleas reversed.*

BANK OF UTICA *v.* BENDER.

Supreme Court of New York, October, 1839. 21 Wend. 643.

Reasonable diligence in endeavoring to find the place of residence of an indorser satisfies the law, so far.

Assumpsit by the holder against an indorser of a bill of exchange. Defence, that due notice had not been given. Verdict for the plaintiff, under instructions that the evidence (stated in the opinion) was sufficient to charge the defendant; to which the defendant excepted. Motion for a new trial. The facts appear in the opinion.

Bronson, J., for the court. — When the facts are all ascertained, what is reasonable diligence is a question of law. 'This results,' said Spencer, J., in Bryden *v.* Bryden, 11 Johns. 187, 'from the necessity of having some fixed legal standard, by which men may not only know the law,

but be protected by it.' Bayley, Bills, 142, 144, and notes. The judge was not requested to submit the question of due diligence to the jury; but, had it been otherwise, he was right in treating it as a question of law, there being no dispute about the facts.

Was there reasonable diligence in endeavoring to ascertain the place to which the notice should be directed? Not knowing where the defendant lived, the plaintiffs inquired of the drawer for whose accommodation the bill was discounted, and relying upon the information given by him, they sent the notice to Chittenango, when it should have been sent to Manlius or Hartsville. This is not like the case of the Catskill Bank *v.* Stall, 15 Wend. 364, affirmed in error, 18 id. 466; for there the person who took the note to the bank, and gave the information on which the notice was misdirected, was the agent of the indorsers, and they had no right to complain that credit had been given to what was, in effect, their own representation.

But I am unable to distinguish this from the case of the Bank of Utica *v.* Davidson, 5 Wend. 587. That was an action against the indorser of a note which had been discounted for the accommodation of the maker, and the notice of protest was sent to Bainbridge, when it should have been sent to Masonville, where the indorser lived. The person who took the note to the bank, and gave the information on which the plaintiffs acted, was the agent of the maker, and it was held that there had been due diligence, and judgment was rendered for the plaintiffs. Sutherland, J., mentions the fact that the note was dated at Bainbridge, where the notice was sent, and that the indorser had but recently removed from that place; but the case was put mainly on the ground, that the plaintiffs had a right to rely on the information given by the agent of the maker when the note was discounted. In the case at bar, notice was directed to the place where the bill purports to have been drawn; and the only difference between this and the case of the Bank of Utica *v.* Davidson consists in the single fact, that the

indorser of this bill had never lived at Chittenango. That does not, I think, furnish sufficient ground for a solid distinction between the two cases.

How does the question stand upon principle? It is not absolutely necessary that notice should be brought home to the indorser, nor even that it should be directed to the place of his residence. It is enough that the holder of a bill make diligent inquiry for the indorser, and acts upon the best information he is able to procure. If, after doing so, the notice fail to reach the indorser, the misfortune falls on him, not on the holder. There must be ordinary or reasonable diligence, — such as men of business usually exercise when their interest depends upon obtaining correct information. The holder must act in good faith, and not give credit to doubtful intelligence when better could have been obtained.

Now, what was done in this case? The plaintiffs inquired of Cobb, the drawer of the bill, who would of course be likely to know where his accommodation indorser lived. They saw that the defendant, by lending his name, had evinced his confidence in the integrity of the drawer; and so far as appears, nothing had then occurred which should have led the plaintiffs, or any prudent man, to distrust the accuracy of Cobb's statements concerning any matter of fact within his knowledge. He professed to be able to give the desired information, and his answer was unequivocal. If Cobb was worthy of being believed, there was no reason for doubt that the indorser resided at Chittenango. The plaintiffs confided in this information, and acted upon it.

But it is said that Cobb had an interest in giving false information for the purpose of protecting his accommodation indorser, and consequently that the plaintiffs should not have trusted to his statement. He certainly had no legal interest in the question. If the bill was not accepted and paid by the drawee, Cobb as the drawer was bound to pay and take it up from the holder; and if the indorser was charged, Cobb was bound to see him indemnified. In a legal point of view, it was wholly a matter of indifference

to him whether notice of the dishonor of the bill should be brought home to the indorser or not. Before anything can be made out of the objection, we must say that the plaintiffs were bound to suspect that Cobb, when he presented the bill, intended to commit a fraud; that he was obtaining a discount upon a draft which he knew would not be paid, either by the drawee or by himself; that the money was to be lost to some one, and that he preferred the loss should fall on the holder rather than the indorser; and consequently, that he would give false information concerning the proper place for directing notice. It is quite evident that the plaintiffs entertained no such suspicion; for, if they had, they would neither have confided in the statements of Cobb, nor would they have loaned him the money. I think they were not bound to believe that a fraud was intended. There was nothing in the circumstances of the case calculated to induce such a belief in the mind of any man of ordinary prudence and foresight. This was an every day business transaction, where men must of necessity repose a reasonable degree of confidence in each other, and no one can be chargeable with a want of diligence for trusting to information which would usually be deemed satisfactory among business men. If there was any ground whatever for suspecting fraud on the part of Cobb, it was, to say the least, very slight, and was fully counterbalanced by the fact that the defendant had testified his confidence in Cobb by lending his name as indorser. The plaintiffs have, I think, lost nothing by trusting to information derived from the drawer of the bill, instead of seeking it from some other individual.

The case then comes to this: The plaintiffs applied for information to a man worthy of belief, and who was likely to know where the indorser lived. They received such an answer as left no reasonable ground for doubt that Chittenango was the place to which the notice should be sent. I think they were not bound to push the inquiry further. Men of business usually act upon such information. They

buy and sell, and do other things affecting their interest, upon the credit which they give to the declarations of a single individual concerning a particular fact of this kind within his knowledge. This is matter of common experience. Ordinary diligence in a case like this can mean no more than that the inquiry shall be pursued until it is satisfactorily answered. This is the only practical rule. If the holder of a bill is required to go further, it is impossible to say where he can safely stop. Would it be enough to inquire of two, three, or four individuals, or must he seek intelligence from every man in the place likely to know anything about the matter? It would be difficult, if not impossible, to answer this question.

New trial denied.

WALKER v. STETSON.

Supreme Court of Ohio, December, 1862. 14 Ohio St. 89.

The fact that a drawer or indorser goes from the place of his residence to another place to dispose of property, which occupies him for several weeks of time, does not make such latter place his place of business.

Action by the holder against the indorser of certain bills of exchange. Judgment for the plaintiff. Writ of error on instructions to the jury. The facts appear in the opinion.

RANNEY, J., for the court. — The bills of exchange upon which this action was brought were drawn and indorsed by the plaintiff in error. His liability upon them was conditional, and his obligation to pay them depended upon their being duly dishonored, and legal notice of such dishonor; unless, indeed, he had waived such diligence on the part of the holder. The bills were legally dishonored and properly protested, and notices for all the parties conditionally liable were in due time forwarded to the defendant in error, a subsequent indorser of the bills. The right

to recover was placed upon two grounds: 1. That the defendant in error had, on the day he received these notices, forwarded by mail those directed to the plaintiff in error, to his place of business at Chicago; and, 2. That a few days thereafter, in a personal interview with the defendant in error, he had recognized his liability as still existing, and had expressly promised to pay the bills. The verdict of the jury may have been founded upon the ground last stated, but, as there was a conflict in the evidence upon it, there is nothing in the record to show that it was; and we are, consequently, compelled to examine the facts applicable to the first ground, and the instructions of the court based upon that state of facts.

Stating these facts as broadly as anything in the evidence will warrant, they amounted to this: The plaintiff in error was a resident of Morristown, New Jersey, and had no fixed residence in the State of Ohio, or at Chicago, but during most of the season of 1856 had been engaged in the lumber business, staying at Cleveland, and in Ottawa County, where he owned a saw-mill; that about the 1st of November he left Cleveland, and, before doing so, informed the defendant in error that he was going to Chicago to dispose of a quantity of lumber which he was about shipping to that place, and should return from there to Cleveland; and had not returned when the notices were mailed to him at Chicago on the 22d of that month, — that being the very day upon which they were received by the defendant in error from the notary in New York. In point of fact, the plaintiff in error was in Chicago when the notices were mailed to him, but probably left there before they arrived, and shortly after was in Cleveland, where he was met by the defendant in error, and fully informed of all that had transpired.

Upon this state of the facts, counsel for the plaintiff in error requested the court to charge the jury: 'That if the defendant's residence was not in Chicago, or he was not engaged in any permanent business there, but was there

temporarily, and for a temporary purpose only, the sending to him, at Chicago, notices of the protest of said bills of exchange would not be, unless the defendant actually received them, due diligence, and sufficient to charge the defendant with the payment of said bills.'

To which the court responded as follows: 'That if the defendant did not reside in Chicago, and was not engaged in any permanent business there, but was there for a purpose merely temporary, sending notices of protest to him at Chicago would not, as a proposition of law, constitute due diligence sufficient to charge the defendant. But if the defendant had gone to Chicago on business which would detain him an indefinite period of time, and might occupy him there during the remainder of the season of navigation on the lakes, that might be the proper place to send the notices to him; and it was a question of fact for the jury to find, referring to all the testimony on that question, whether the business of the defendant at Chicago was of that character, or whether the plaintiff had sufficient reason from his information derived from the defendant, or from his own knowledge of the defendant's business, to believe the defendant was at Chicago at the time the notices were sent by him, such notices would be due diligence on the part of the plaintiff, and sufficient to charge the defendant.'

If we were permitted to treat the matter as a question of injury to the plaintiff in error, there would be no difficulty whatever in saying that he lost nothing by the course pursued by the defendant in error, and probably was actually informed of the dishonor of the bills sooner than he could have been, if the notices had been sent to his residence in New Jersey. But we are not at liberty to take so wide a view of the subject. The law has very definitely settled what shall constitute due diligence in such cases, and when the facts are ascertained, it is the duty of the court to determine, as a question of law, whether reasonable diligence has been used; and it cannot be submitted

to the jury as a question of fact. Bank of Columbia *v.* Lawrence, 1 Peters, 578; Bank of Utica *v.* Bender, 21 Wend. 643; Carroll *v.* Upton, 3 Comst. 272; Wheeler *v.* Field, 6 Met. 290; Belden *v.* Lamb, 17 Conn. 442; Lorain Bank of Elyria *v.* Townsend, 2 Ohio State, 343. The object has been to attain the greatest possible certainty in a matter so vital to the interests of the mercantile community, and the equities of particular cases have not been allowed to interfere with the attainment of this object. In this State, these rules have been fully adopted and constantly enforced, and, if we saw reason now to doubt their justice or policy, we should find ourselves unable to change them, without a corresponding change should take place in States and countries with which our commercial relations are so extensive and important.

The parties in this case not residing in the same place, there is no doubt that it was a proper case for sending the notices by mail, and in such cases it is well settled that putting into the post-office seasonably a notice properly directed is, in itself, due diligence, or constructive notice, and will be sufficient, although it never reaches the party to whom it is directed. Woodcock *v.* Houldsworth, 16 Mees. & W. 124; Dickens *v.* Beal, 10 Peters, 570; Jones *v.* Lewis, 8 Watts & S. 14. As to the place to which the notice should be directed, it is equally well settled that it should be sent to the drawer or indorser's residence or place of business, if either is known to the holder, or, upon diligent inquiry, can be ascertained; and if neither are known nor can be found, the law dispenses with any notice whatever. Bank of the United States *v.* Carneal, 2 Peters, 543; Chitty, Bills, 486; Bayley, Bills, 280. But while this is the general principle, the spirit of the rule certainly is, that the notice should be sent to such place that it will be most likely promptly to reach the person for whom it is intended; and hence, in its application to particular cases, it has often been held that a notice is sufficient if sent to the post-office where the party usually

receives his letters, although not that of his residence, as well as to that where he resides; and in all cases the notice may be sent to the place pointed out by the drawer or indorser, and in general will be sufficient, both in reference to himself and parties who stand behind him on the bill. Reid *v.* Payne, 16 Johns. 218; Bank of Geneva *v.* Howlett, 4 Wend. 328; Bank of United States *v.* Lane, 3 Hawks, 453; Shelton *v.* Braithwaite, 8 Mees. & W. 252. Indeed, it is suggested in the present case that the statement made by the plaintiff to the defendant in error sufficiently indicated Chicago as the place to which the notices might be sent. Whatever of weight this suggestion may properly have, it can only be considered by us when the case in the court below appears to have been decided upon that ground. As yet this consideration has not been passed upon in that court.

How then, in view of the foregoing principles, stands the case before us? Was Chicago, in the sense of the legal rule, so far the residence or place of business of the party as to make the notices sent there constructive notice of the dishonor of the bills? A very careful examination of all the evidence now contained in the record has fully satisfied us that it was not. Upon this point, there is no conflict in the evidence. The plaintiff below says the defendant informed him he was going to Chicago 'to dispose of a quantity of lumber, which he was about shipping to that place, and should return from there to Cleveland;' that he knew the defendant had been to Chicago, but did not know that he was there when the notices were mailed, and had reason to believe he did not receive them there, as he was soon afterward back to Cleveland. The defendant says he went to Chicago, and was there from the 1st to the 24th of November, 'disposing of a quantity of lumber,' and in the afternoon of the day last named, he left Chicago, and arrived at Cleveland on the morning of the 26th; that he had no permanent business at Chicago, and was there for a temporary purpose only, and never received the notices sent.

The question is then reduced to this: Does going to a city to dispose of property, which occupies the party for three weeks of time, without one word of explanation as to the mode of doing the business, or his relations to the post-office, make such city his place of business within the meaning of the commercial rule? If we were to affirm that it did, the principle must have a very wide, and as we think a very disastrous, application to a large class of business men, dealing more largely than any other in commercial paper. The stock and produce of the West are taken to the eastern cities, by persons engaged in that business, to be sold; and most western merchants, once or twice in each year, spend from a few days to a few weeks at the same places, replenishing their stocks of goods. Did anybody ever suppose that these persons were bound to watch the post-offices in those cities for notices of the protest of their paper? We think not; and yet, if these notices are sufficient, we see no distinction to be taken between this case and theirs. It is very certain that no decided case has given any countenance to the supposition that such a notice, not received by the party, would be sufficient.

The cases of Tunstall *v.* Walker, 2 Sm. & M. 638, and Chouteau *v.* Webster, 6 Met. 1, have, perhaps, gone to the verge of the law, but they are very far from reaching this case. In each of those cases, the defendant was, at the time the notice was forwarded to him at Washington, a senator in Congress, and in actual attendance on that body. The first of these cases had been before decided by the High Court of Errors and Appeals, and is reported in 1 How. (Miss.) 259. Upon the then state of the evidence, the court held that a notice sent to Washington City, when the senator had a residence in the State which he represented, would not be sufficient to charge him as an indorser; and the reason assigned is that 'his absence was but temporary, and the duration of that absence uncertain. In case of such absence from home, the law presumes that

some member of the family is still at the residence, and that communications will be forwarded to the proper address.' But, upon a further trial of the case, it was proved that the defendant had no actual residence in Mississippi, and had left no agent at his last place of abode to receive or forward his letters; that from the 4th of February, when the notice was forwarded, to the 4th of March ensuing, he was in the actual discharge of his official duties at Washington, and in the daily habit of receiving his letters at the post-office in that city; and, upon this state of facts, the court held the notice sent to that city sufficient. In the case of Chouteau v. Webster, the defendant had left an agent in Boston in charge of his business, but this was unknown to the holder of the paper, and upon an agreed statement of the facts showing that the notice was, in due time, deposited in the post-office directed to the defendant at Washington, where he was then, and for some time afterward, in attendance upon a session of Congress; and that all letters addressed to members were regularly and immediately taken from the post-office by officers of the Senate, and delivered to such members, the court held the notice sufficient. Shaw, C. J., after premising the caution that the 'decision is founded on the circumstances of the particular case, and may be varied by other facts,' proceeds to place it upon the ground that, while the defendant's domicile was at Boston, his 'actual residence' was at Washington, 'to which, for the time being, he was fixed by his public duty.' We have no doubt of the correctness of these decisions; and no comment can be necessary to distinguish them from a case where the party simply visits a place for a purpose clearly temporary and special, with no proof to show that he has identified himself with its business, or established any relations with its post-office. Regarding that as this case, we are clearly of the opinion that the plaintiff in error was entitled to the instruction he asked, and that the learned judge erred in the qualifications he annexed to the instruction given.

If we were entirely satisfied of the correctness of this qualification in the abstract, we should still be compelled to reverse the judgment for the reason that there was no evidence to give any wider scope to the inquiry than that contemplated in the instruction asked for. That this was an error has been settled by this court, and the value of jury trial will very much depend upon the observance of the principle. In Bain *v.* Wilson, 10 Ohio State, 16, the instruction asked and given, as well as the qualification annexed by the court, were all held to be a correct exposition of the law; and yet, as 'there was no evidence before the jury which required or even authorized the qualification annexed by the court,' the judgment was reversed. The court say: 'The judge must confine himself in his remarks to the law and evidence of the case. So far from being under any obligation to call the attention of the jury to a conjectural state of facts, it would be highly improper for him to do so.' And the reason for this is very pertinently stated in one of the cases referred to: 'Jurors are constantly inclined to look to the opinion of the judge for instruction as to what is and what is not evidence. When he tells them to determine a given problem from the evidence before them, they can hardly do otherwise than infer that, in his judgment, there is evidence upon which their verdict, when given, may rest.' Fay *v.* Grimsteed, 10 Barb. 321.

But we are very far from being satisfied that the qualification annexed in this case does contain a correct statement of the law. After stating that, if the plaintiff in error was in Chicago for a purpose merely temporary, the notices would not be sufficient, the court proceed to say that if his business there was such as would detain him an indefinite time, and 'might occupy him there during the remainder of the season of navigation on the lakes,' it might be proper to send the notices to that place. If he went there for the special purpose stated in the evidence, we do not think it would make any difference that

he could not tell precisely when he would be able to sell his property; and, when it is remembered that this was in the month of November, we do not think that a delay in effecting his object until the navigation should close would be in any way decisive. At most, it would be but a circumstance, entitled to its just weight with others in determining the question whether Chicago was his place of business, or whether he was a mere sojourner there for a special and limited purpose. In the one case, he might be charged by a notice sent to that post-office, because he is presumed to have established relations with it; in the other, no such presumption arises, and he can be charged only upon the actual receipt of the notice. Indeed, when the whole instruction is taken together, it amounts to little less than a request to the jury to go beyond the uncontradicted and legally insufficient facts in evidence, and inquire into the motives of the plaintiff below; and concluding with the positive instruction that, if he had sufficient reason 'to believe the defendant was at Chicago at the time the notices were sent,' they would be sufficient to charge him.

Without perhaps intending to do so, it seems to us that the court has incautiously surrendered its rightful province to judge of the sufficiency of the facts to constitute due diligence, and has devolved that duty upon the jury. To approve of that would be to abandon all that has been gained in the way of certainty, in the determination of questions of this character.

While it is true that the rules necessary to be observed in charging parties conditionally liable upon negotiable paper are strict, and require much care and promptitude on the part of the holder, yet they are such as long experience has demonstrated to be necessary, and a substantial compliance with them lies at the very foundation of the contract into which the drawer or indorser enters. His contract is conditional; and to make it absolute, without a fair performance of the conditions, would be to make a

contract for him, instead of enforcing the one he has made for himself.

The judgment must be reserved, and the cause remanded to the District Court of Cuyahoga County for further proceedings.

SIGERSON *v.* MATHEWS.

Supreme Court of the United States, December, 1857. 20 How. 496.

Promise to pay, by an indorser, made before or, with full knowledge of facts, after maturity, is a waiver of steps.

The case is stated in the opinion of the court.

McLean, J., for the court. — This is a writ of error to the Circuit Court for the district of Missouri.

An action was brought by Mathews against John Sigerson, as indorser on a note of James Sigerson, now deceased, dated the 10th of March, 1852, for the payment of the sum of $2,000, two years after date, at the Bank of the State of Missouri, with interest from the date.

It was proved on the trial that in 1851 Mathews advanced largely to John Sigerson on some transactions in pork, whereby Sigerson became indebted to him in the sum of $2,000; that Sigerson wanted two years' time, on which Mathews required a mortgage on real estate as security; but Sigerson offered to give the note of his brother James, indorsed by himself, instead of the mortgage; and he represented that his brother James was the owner of a valuable real estate near St. Louis; which offer was accepted, and the note was given.

Some time in the fall of 1852, Joseph E. Elder, a witness, received the note from Mathews for collection, soon after the death of James Sigerson, and before the note became due. Witness called on John Sigerson, and asked him if he should have the note protested against the estate of James Sigerson. He replied, that the witness need

not do so, and that the notes should be paid at maturity. The witness then placed the note in his portfolio, where it remained until after due. After it was due, witness called on John Sigerson, and informed him that he had neglected to put the note in bank for collection, and asked him what he was going to do. He said he would see witness in a few days, and arrange it. Afterwards Sigerson said to the witness that he did not consider himself liable as indorser, as the note had not been protested.

In February, 1852, John Sigerson sold his interest in the farm near St. Louis, which was one half of it, and which contained about one thousand acres, to James Sigerson, who was to pay off the incumbrances on the land, which amounted to about $16,000. James executed twenty notes for $2,000 each, payable in six, twelve, and eighteen months; and John Sigerson made him a deed. In July, 1852, James reconveyed the land to John, and the bargain was rescinded. This was done because James had not fulfilled his contract. Nineteen of the notes were given up, but the note now in suit was not surrendered, and for which the account of James was credited on the books of John. James, on his decease, left no property.

On the above facts, the court charged the jury, 'if they believe from the evidence, that, before the maturity of the note, in conversation with the agent of the plaintiff, the defendant dispensed with a presentation of the note and demand of payment, and promised to pay it or provide for its payment at maturity, he cannot now set up as a defence to this suit, that the note was not presented for payment, and demand made therefor, when it was due, and that no notice of its dishonor was given;' that, 'if, after the maturity of the note, the defendant promised the plaintiff or his agent to pay the same, having at the time of making said promise knowledge of the fact that the note had not been presented for payment, and that no demand had been made therefor, or notice of non-payment given, the defendant cannot now set up, as a defence to said note,

a want of such demand or notice.' 'If the defendant dispensed neither with the presentation of the note and notice, nor promised to pay the same, having knowledge as above stated, the plaintiff cannot recover.'

Exception was taken to these instructions. Certain instructions were asked by the defendant, which were refused; but it is unnecessary to state them, as they are substantially embraced in those given by the court.

As there was no formal demand of payment, nor protest for non-payment and notice, those requisites must have been waived by the defendant, to make him responsible as indorser; and to this effect were the instructions of the court; and we think the testimony not only authorized the instructions given, but also the verdict rendered by the jury. Before the note was due, the defendant said to Elder, the agent of Mathews, and who held the note, that he need not take steps to collect it from the estate of his brother James, as it should be paid at maturity. This was an assurance which could not be mistaken, and it was relied on by the agent. He placed the note in his portfolio, where it remained until after it became due. After this, the agent called on the defendant, and informed him that he had neglected to take measures for the collection of the note, and asked him what he was going to do. He answered, that in a few days he would see the witness, and arrange it. This was an unconditional promise to pay the note, which no one could misunderstand, and which he could not repudiate at any subsequent period.

A promise by an indorser to pay a note or bill dispenses with the necessity of proving a demand on the maker or drawer, or notice to himself. Pierson *v.* Hooker, 3 Johns. 68; Hopkins *v.* Liswell, 12 Mass. 52. Where the drawer of a protested bill, on being applied to for payment on behalf of the holder, acknowledged the debt to be due, and promised to pay it, saying nothing about notice, it was held that the holder was not bound to prove notice on the trial. Walker *v.* Laverty, 6 Munf. 487. An uncondi-

tional promise by the indorser of a bill to pay it, or an acknowledgment of his liability, and knowledge of his discharge by the laches of the holder, will amount to an implied waiver of due notice of a demand of the drawee, acceptor, or maker. Thornton *v.* Wynn, 12 Wheat. 183; Bank of Georgetown *v.* Magruder, 7 Peters, 287. We think the instructions of the court were correct, and that consequently the judgment must be

Affirmed, with costs.

FOSTER *v.* PARKER.

Common Pleas Division, High Court of Justice of England, November, 1876. 2 C. P. D. 18.

That an indorser of a bill of exchange was not damnified by want of notice of dishonor, does not excuse want of notice.

Action on a bill of exchange by an indorsee against an indorser. Statement of defence, want of notice of dishonor. Reply: That neither at the time when the bill was drawn, nor afterwards, nor when it became due and on presentment thereof, had the acceptor, or the drawer, or any indorser prior to the defendant, any effects of the defendant in his hands, and the said bill was drawn by the drawer and accepted by the acceptor and indorsed by the defendant and by the prior indorsers for the purpose of raising money for the defendant, the drawer, the acceptor, and the said persons who indorsed before the defendant, jointly; and the defendant was in no way damnified even if there was no notice of dishonor. Demurrer and joinder.

Denman, J. — I am of opinion that our judgment should be for the defendant. I think the allegation in the reply, that the defendant was in no way damnified by want of notice of dishonor, must be treated as an allegation of law, a mere conclusion from the previous allegations. Then,

are those allegations sufficient to make the reply good? In the case of Bickerdike *v.* Bollman, 1 T. R. 405, it was held that no notice of dishonor was necessary; but in all the subsequent cases on the subject it is laid down that the doctrine in that case ought not to be extended; and that, with regard to an indorser, to excuse notice of dishonor facts must be stated which show, not as a mere possibility but as an absolute certainty, that he could not be damnified by the absence of such notice. The facts alleged in the reply only show that the drawer, acceptor, and prior indorsers of the bill were jointly interested with the defendant in some transactions for the purposes of which the amount of the bill was to be raised. It seems to me that so far from these facts making out that the defendant could not be damnified by want of notice of dishonor, the prima facie inference from them is that he would be. All the parties being interested jointly, prima facie if the defendant had to pay the whole amount of the bill he would be entitled to contribution from the other parties. The authorities cited in argument all show that the principle of Bickerdike *v.* Bollman, 1 T. R. 405, cannot be extended to the case of an indorser, unless it is clearly made out that under no circumstance could he be prejudiced by absence of notice. The allegations in the reply do not make this out.

Lindley, J. — To disentitle the defendant as the indorser of a bill of exchange to notice of dishonor the plaintiff must show that it was the defendant's duty, as between himself and the other parties to the bill, to provide for it. It is obvious that the court cannot come to the conclusion that the defendant was, as between himself and the other parties to this bill, bound to provide for it from the averments in this reply. Indeed, the prima facie inference from them would be that he was not. The case therefore does not come within the authority of the cases in which notice of dishonor has been excused. With

regard to the general allegation that the defendant was not damnified by absence of notice of dishonor, it seems to me insufficient as being too vague. It might mean that the other parties to the bill would not have been able to pay. He would be damnified in the legal sense if he had a remedy over against any of them and was not bound, as between himself and them, to meet the bill. For these reasons I agree that our judgment should be for the defendant.

Judgment for the defendant.[1]

ARNOLD v. DRESSER.

Supreme Court of Massachusetts, September, 1864. 8 Allen, 435.

In order to charge an indorser of a joint note, a demand must be made upon all the promisors by some one who has the note with him at the time, unless special circumstances are shown to excuse its absence.

Such demand is not waived by a promise by the indorser to pay the note, if at the time of making the promise he is erroneously informed by the holder that a due demand has been made upon the promisors.

Contract against the indorser of a joint promissory note.

At the trial in the Superior Court, before Morton, J., it appeared that on the day when the note became due, Theodore S. Stratton, in behalf of the plaintiff, demanded payment thereof of the two promisors, but did not have the note in his possession at the time; and the note was not paid. The plaintiff testified that on the same day he called upon the defendant, and gave notice to him that demand had been made on the makers; that one of the makers called during the interview, and both he and the defendant said that the note should be paid soon.

Upon this evidence, the judge ruled that the plaintiff was not entitled to recover, and directed a verdict for the de-

[1] See Turner v. Samson, 2 Q. B. D. 23. As to Bickerdike v. Bollman, 1 T. R. 405, cited supra, see Hopkirk v. Page, 2 Brock. 20; L. C. Bills & Notes, 96, 97.

fendant, which was accordingly rendered, and the plaintiff alleged exceptions.

Bigelow, C. J., for the court. — The defendant is not liable as indorser of the note declared on. In order to charge him it was necessary for the plaintiff to show due presentment and demand of the note on both the promisors; Union Bank of Weymouth, &c. *v.* Willis, 8 Met. 504;[1] or a waiver thereof by the defendant. There were no such presentment and demand. If a note is made payable at a particular place, the holder must have it at that place on the day of its maturity, in order to make due presentment; if it is not payable at a designated place, the note must be presented to the promisor at his usual place of business or at his dwelling-house. But no valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence. Shaw *v.* Reed, 12 Pick. 132; Freeman *v.* Boynton, 7 Mass. 483.

Nor was there any waiver of due demand by the defendant. No such waiver is made, where an indorser promises to pay the note in ignorance of the fact that he has been discharged by the laches of the holder, in not making due demand of the promisor, or where such promise is made under a misapprehension or mistake of facts concerning the due presentment and demand of the note. Low *v.* Howard, 11 Cush. 268; Kelley *v.* Brown, 5 Gray, 108. In the case at bar, the defendant made the statement on which the plaintiff relies to show a waiver, not only in ignorance of the fact that the note had not been duly demanded of one of the promisors, but under a mistaken belief that it had been so demanded, induced by the false statement to that effect made to him by the plaintiff.

Exceptions overruled.

[1] Ante, p. 38.

LEHMAN v. JONES.

Supreme Court of Pennsylvania, May, 1841. 1 Watts & S. 126.

If the maker of a promissory note absconds before the maturity of the note, this will excuse the holder from making presentment at his last place of residence.

Assumpsit against Lehman and Stroh, as indorsers of a promissory note.

It was proved that Robinson, the maker of the note in suit, had absconded to parts unknown and had not returned. The objection was that no demand was made upon Robinson, and that the notice was informal.

The court below thus instructed the jury: —

Parsons, President. — The court instruct the jury, as a matter of law, if they believe that Robinson absconded in December, 1835, as testified to by his mother, and did not return before the note became due, nor since, it was not requisite that the holders of the note should go to Jonestown, and attempt to make a demand upon him in order to charge the indorsers; provided the indorsers were cognizant of the fact that the drawers had left the State, of which there would seem to be no doubt, if the testimony of Mrs. Robinson is believed.

Per Curiam.[1] — The rule in Lambert v. Oakes (1 Ld. Raym. 443) is, that the holder must have demanded, or done his endeavor to demand, the money. But the law is not so unreasonable as to require an impossibility; and therefore it is said (Id. Anon. 743), that where the drawee of a bill has absconded before the day of payment, notice of the fact is equivalent to notice of demand and dishonor. In Duncan v. McCullough, 4 Serg. & Rawle, 480, the principle was recognized as being applicable to a promissory

[1] Gibson, C. J., Rogers, Huston, Kennedy, Sergeant, JJ.

note; and it has been established by direct decision in some of our neighboring States. It would have been idle for the plaintiff to demand payment at the late residence of Robinson, the drawer, after he had absconded. Where, indeed, the drawer of a note or the drawee of a bill has merely removed from the place of his residence, indicated by the bill, it is the business of the holder to inquire for him and ascertain where he has gone, in order that he may follow him; but when he has secretly fled, an application at the place would lead to no information in respect to him; and the law requires nothing which is nugatory. The other errors are either resolvable by this precedent, or are plainly unfounded. *Judgment affirmed.*

BERKSHIRE BANK *v.* JONES.

Supreme Court of Massachusetts, September, 1810. 6 Mass. 524.

Waiving notice by an indorser does not excuse demand; but if the paper was payable at a designated place, and the indorsee was ready to receive payment at the time and place, no further demand is necessary.

The plaintiffs declare on a promissory note made by one Amasa Glesen, on the 21st of October, 1807, by which he promised the defendant to pay him or his order $125, at the Berkshire Bank, in sixty-one days; and on an indorsement by the defendant, he waiving all right to the notice, to which, by law or custom, he was entitled as indorser. The plaintiffs also allege a request and refusal by Glesen, the maker, and also notice to the defendant.

The action was tried before Sedgwick, J., who directed a nonsuit, subject to the opinion of the court, whether it was necessary to the support of this action, that, previous to the commencement thereof, the contents of the note declared on should have been demanded of the promisor.

Parsons, C. J., for the court. — The defendant has argued that, although he waived notice of a refusal of payment by

the maker, yet he did not thereby dispense with a demand upon him; for he might waive the notice from a confidence that the maker would pay the note on demand.

This construction of the waiver we think correct; and the objection would be conclusive, if the indorsement had not been made to the plaintiffs, at whose office the note was to be demanded and paid. The note was payable on a day and at a place certain; and the place is the Berkshire Bank. A demand of payment need not be made at any other place; and if the holder of the note is at the bank on the prescribed day, ready to receive the money, if the maker be there, it is enough for him. And if the maker does not come to the bank, or direct the payment there, he has broken his promise; and no other notice to him is necessary.

In the case at bar, as the plaintiffs held this note, we must presume it was in their bank, and there it was made payable. They were not to look up Glesen, or to demand payment of him at any other place. The defendant, by his indorsement, guarantied that on the day of payment the maker would be at the bank, and pay the note; and if he did not pay it there, he agreed that he would be answerable in a suit at law, without previous notice of the default of the promisor.

Although we are satisfied that the judge was correct in his construction of the terms of the defendant's waiver of notice, considered in a general view, yet we are of opinion that, from the special tenor of the note declared on, the nonsuit ought to be set aside; and if, on the trial, the plaintiffs can show that on the day of payment the note was in the bank, and that the servants or officers of the plaintiffs were there during the usual bank hours, to receive payment and give up the note, they will be entitled to recover, as, by the terms of the note, they were not holden to demand payment but at the bank, which was impracticable through the default of the maker; and by the defendant's waiver he cannot claim notice.

GRANT *v.* ELLICOTT.

Supreme Court of New York, May, 1831. 7 Wend. 227.

In an action by an indorsee of a bill of exchange against the acceptor, it is no defence that the bill was accepted for the accommodation of the drawer, and that the indorsee had knowledge of the fact when he took the bill.

Assumpsit by indorsee against the acceptor of a bill of exchange. Plea, that the bill was accepted for accommodation of the drawer and that the plaintiff took it with knowledge of the fact. Demurrer to the plea.

SAVAGE, C. J., for the court. — The defendant says he ought not to pay the bill, because no consideration passed between him and Graham, and this was known to the plaintiffs; that is, the defendant accepted the bill for the accommodation of the drawer, which the plaintiffs knew. This is no defence; it was so decided in Smith *v.* Knox, 3 Esp. 46. Lord Eldon there held that, where a bill is given for the accommodation of the drawer or payee, and is sent into the world, it is no answer to an action upon it against the acceptor, that he accepted it for the accommodation of the drawer and that the fact was known to the holder. In such case, the holder, if he gave a bona fide consideration for it, is entitled to recover, though he had full knowledge of the transaction. In that case, the plaintiff produced no proof but of handwriting of the parties to the bill.

The case of Charles *v.* Marsden, 1 Taunt. 224, was very like this case. The action was brought by the indorsee against the acceptor. The defendant pleaded that it was accepted for the accommodation of the drawer, and without any consideration, and that this was known to the plaintiffs when they took the bill, after it was due. Mansfield, C. J., says: 'There is no allegation of fraud in this plea, nor any allegation that the plaintiff did not give a valuable consideration for this bill; it must, therefore, be presumed that

he did.' Lawrence, Justice, says: 'In the present case, it is to be supposed that the party (drawer) persuades a friend to accept a bill from him, because he cannot lend him money; would there be any objection, if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due? Then what is the objection to his furnishing it after it is due? For there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it.'

I know of no decision supporting this plea, and it would be extremely prejudicial to commercial paper if it could be supported. The acceptor in a bill is considered in the same light as an indorser of a promissory note; and it is well known that much of the paper discounted in our banks is accommodation paper, and it never has been supposed that the indorser in such case is not liable.

Judgment for plaintiffs on demurrer, with leave to amend, on payment of costs.

SMALL v. SMITH.

Supreme Court of New York, October, 1845. 1 Denio, 583.

One who purchases accommodation paper, with knowledge that the terms and conditions on which the accommodation was given have been violated, is not a bona fide holder as against the party who lent his name for accommodation.

Assumpsit upon a negotiable note, signed by the defendant as surety for accommodation of the maker. Defence, fraudulent diversion, and that the plaintiff took the note with knowledge. Verdict for the plaintiff, upon instructions to the jury to which the defendant excepted. Motion for a new trial, for misdirection. The facts are detailed in the opinion.

Beardsley, J., for the court. — If the evidence given on the trial was true, and that was for the jury to determine,

it is perfectly clear that the note was delivered to the plaintiffs in violation of the agreement upon which it had been indorsed by the defendant. The plaintiffs, therefore, were not entitled to recover, unless they received it bona fide and upon a valuable consideration. Both were necessary. It must have been received in good faith, without notice of the arrangement on which the indorsement had been made, and the transfer must have been upon what the law regards as a valuable consideration. These principles admit of no dispute; and although, upon some points of commercial law in close proximity to those I have stated, discordant opinions may be found, Stalker *v.* McDonald, 6 Hill, 93, Swift *v.* Tyson, 16 Peters, 1, there is entire harmony as to those I have mentioned.

The judge charged that, if the plaintiffs received the note in payment and satisfaction of a debt due to them from Hulburt, the maker of the note, that was a sufficient consideration for its transfer, and they thereby became purchasers for value. This, as a legal proposition, is not questioned; but the bill of exceptions fails to show any evidence to which this principle could be applied. There was no proof which tended to show that the note had been transferred in extinguishment of the debt of Hulburt. The judge, therefore, in my view of the case, erred in submitting that question to the jury.

But I shall not dwell on this point, for the case may be disposed of on the question of good faith.

It appears by the testimony of Hulburt that he was indebted to the plaintiffs in a sum exceeding the amount of this note, and that Small, one of the plaintiffs, came to Vienna, where Hulburt resided, to secure payment of said debt. Small proposed to Hulburt to give a note at one year with security, and the defendant, who lived in another county, was spoken of for that purpose. Small said he would take the defendant as surety, and it was arranged that, while Small was absent (as he was going West for a few days), Hulburt should go to the defendant's residence

in order to obtain him as such surety. Pursuant to this arrangement, Hulburt went to see the defendant, and told him what he wanted. At first the defendant refused to indorse; but it was finally agreed between them that he would indorse the note upon condition that one Austin, who then held a note given by the defendant, should deposit the same with a third person, there to remain until the defendant should be discharged from said indorsement. The note in question was accordingly signed by Hulburt and indorsed by the defendant; but it was not to be transferred to Small, or used in any manner, until the one held by Austin had been deposited under said arrangement. Hulburt returned with the note to Vienna, where Austin lived, and told him of the arrangement under which the indorsement had been made. Austin declined to comply with that arrangement; but Hulburt, as he states, left the note in suit on Austin's table, and did not see it again until Small had returned to Vienna. Hulburt first saw Small after his return at Austin's office, where, on arriving at the office, according to the testimony of Hulburt, Small said to him, 'We have fixed that matter, and Mr. Austin has let me have the note.' The witness then inquired of Austin, in Small's presence, in what manner the note had been turned out, and whether the arrangement of the defendant had been complied with, to which Austin made no answer; but Small said he had prevailed on Mr. Austin to indorse the note, and he had got it. This, according to the witness (Hulburt), was all which passed at that time. Another witness (Paul), who was present, said the remark of Hulburt to Austin was that he supposed he had not turned out the note without complying with the request of Mr. Smith, the defendant, to which Austin made no answer; but Small said he had prevailed on Mr. Austin to indorse the note, and had released Mr. Smith.

It is not material which of these witnesses was correct as to the form of the remarks made at that time. Both come to the same result; for what was said, according to the

statement of either witness, was full notice to Small that the indorsement had been procured upon some arrangement or condition which had not been complied with. Here, then, Small had actual notice that the indorsement was conditional; and, if the note was subsequently transferred to him, he would necessarily take it subject to that condition. When this notice was given, the note was in Small's hands. He had received it, as he said, of Mr. Austin. But it cannot be pretended he had received it of Austin upon any consideration moving between them. Indeed, the first remark of Small to Hulburt, and all that was said on that occasion, goes to show that whatever might have been done by Austin had been done for Hulburt, and not for himself, and in furtherance of the negotiation which had been commenced between Hulburt and Small. It is not shown that Austin had authority from Hulburt to transfer this note to Small on any terms, although it may be inferred that he was authorized to do so, on complying with the condition upon which the defendant's indorsement had been made. Small did not set up that he had received the note as the property of Austin, and the whole transaction shows he did not. He could not, therefore, upon the facts as disclosed by the witnesses, pretend that he had acquired title to the note in any manner before he was apprised by Hulburt that the indorsement was made on a condition which had not been performed. It is more a matter of inference than of anything like direct proof, that Hulburt at any time assented to the transfer of the note to Small; but if he did so, after notice to Small of the condition on which the indorsement had been made, it is plain that the plaintiffs ought not to recover, as the condition has never been performed. If the plaintiffs claim as purchasers of the note from Austin, they are met by two objections: first, Small, one of the plaintiffs, was aware that the note belonged to Hulburt, and not to Austin; and, secondly, it is not shown that the plaintiffs paid or advanced anything to Austin, or that any consideration passed between them for the transfer of the note.

And as to Hulburt, if he assented to the transfer of the note to Small, it was after explicit notice that the indorsement was conditional, as is proved by the testimony of both Paul and Hulburt. Had the case been put to the jury upon the point of notice, with suitable explanations, there is no doubt what the verdict should and would have been, unless these witnesses were wholly discredited. I think the case was not so submitted to the jury, and that it should be sent back for a new trial. *New trial granted.*

BELCHER v. SMITH.

Supreme Court of Massachusetts, September, 1851. 7 Cush. 482.

The payee of a note, who signs his name to these words written on the back thereof, 'I hereby guaranty the within note,' is not liable thereon as indorser.

This was an action of assumpsit on a promissory note, bearing date of January 16, 1850, and payable to the defendant or his order, on demand.

At the trial in the Court of Common Pleas, before Hoar, J., the following facts appeared: The defendant on the 3d of February, 1850, transferred this note to Field & Leland, in payment of a debt, and wrote his name on the back of the note, with these words over it: 'I hereby guaranty the within note.' Field & Leland subsequently transferred the note to the plaintiff, and indorsed upon it, over their signature, these words: 'For value received pay to Henry S. Belcher at his own risk.' The defendant objected that the plaintiff could not maintain an action in his own name, on the defendant's indorsement; that it showed a contract of guaranty with Field & Leland, and was not negotiable. But the court ruled that although the contract of guaranty was not negotiable, the effect of the transfer of the note from the defendant to Field & Leland with the indorsement upon it, was such as would have

authorized Field & Leland, and would authorize the plaintiff, to write over the indorsement the words 'pay to Field & Leland or their order;' and the plaintiff was permitted by the court against the objection of the defendant to write those words.

The plaintiff having obtained a verdict, the defendant excepted to the above ruling.

DEWEY, J., for the court. — The question raised in the present case, of the right of the plaintiff to maintain an action as indorsee of the promissory note sued upon, was fully considered by us and settled in the recent case of Tuttle *v.* Bartholomew, 12 Met. 452. Upon a review of the question, and comparison of the conflicting decisions and grounds upon which they were placed, the court were of opinion that where the name of the payee of the note was indorsed on the back of the note in no other form than as a signature to a guaranty fully written out and expressed, leaving nothing for implication, this was not such an indorsement as authorized a subsequent holder of the note to sue upon it as indorsee. It is true there was the further objection in that case, that the guaranty was signed not only by the payee of the note, but also by another person, and in the form of a joint guaranty. But irrespective of that, the court were of opinion that the plaintiff could not enforce the payment of the note by a suit in his own name, as indorsee. *New trial ordered.*

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MOSES v. LAWRENCE COUNTY BANK.

Supreme Court of the United States, October, 1892. 149 U. S. 298.

Guaranty of the payment of a promissory note made thereon on a day subsequent to the delivery of the note, requires a distinct consideration, and in Alabama a distinct expression of the same in writing. Aliter if note and guaranty are contemporaneous.

Action upon a guaranty of a negotiable promissory note made by and payable to the order of Sheffield Furnace Company; the guaranty being in the following words written upon the note and signed: 'We hereby guaranty the payment of the note at maturity.' It was alleged in the complaint that the guaranty was made for valuable consideration; that the note with the guaranty thereon was indorsed by the payee, for value, to the order of J. P. Witherow, before maturity, and before maturity indorsed and transferred for value by Witherow to the plaintiff; and that the defendants waived protest and notice.

The note was made and was payable in Alabama, a statute of which provides that a special agreement to answer for the debt of another is void 'unless such agreement or some note or memorandum thereof, expressing the consideration,' is in writing. The defendant pleaded, inter alia: —

Fourth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration for the promise.

Fifth. That the note was given by the Sheffield Furnace Company for a debt owing to Witherow before it was made, and was not founded upon a consideration paid or liability accrued at the time of the making thereof, and the guaranty was without any consideration.

Eighth. That the Sheffield Furnace Company paid the debt sued on to Witherow before this action was commenced.

Twelfth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration therefor, and was not executed contemporaneously with, nor before the negotiation of, the note of which it guarantied the payment.

The plaintiff demurred to the fourth and fifth pleas, because they did not deny that the defendants indorsed the guaranty upon the note contemporaneously with its execution and before any negotiation thereof; and also demurred to these pleas, as well as to the twelfth plea, because they did not deny that the defendants indorsed the guaranty upon the note before its negotiation to the plaintiff, and in order to give it credit and currency, nor allege that the plaintiff had notice of any want of consideration for the guaranty.

To the eighth plea a replication was filed, alleging that the plaintiff became the owner of the note for a valuable consideration before maturity, and that no part thereof had ever been paid to the plaintiff or to any one authorized by the plaintiff to receive it. To this replication the defendant demurred.

The court below sustained the demurrers to the pleas, and overruled the demurrer to the replication.

Issue was then joined on the eighth plea and the replication thereto; and a trial by jury was had upon that issue, at which the plaintiff gave in evidence the note with the indorsements and the guaranty thereon.

Verdict for the plaintiff, by direction of the court. Exceptions and writ of error taken.

Mr. Justice GRAY, for the court. — By the Statute of Frauds of Alabama a special promise to answer for the debt, default, or miscarriage of another is void 'unless such agreement, or some note or memorandum thereof, expressing the consideration' is in writing and subscribed by or in behalf of the party to be charged. Alabama Code of 1887, § 1732. The words 'value received,' or

acknowledging the receipt of one dollar, sufficiently express a consideration. Neal v. Smith, 5 Ala. 568; Bolling v. Munchus, 65 Ala. 558.

Every negotiable promissory note, even if not purporting to be 'for value received,' imports a consideration. Mandeville v. Welch, 5 Wheat. 277; Page v. Bank of Alexandria, 7 Wheat. 35; Townsend v. Derby, 3 Met. 363. And the indorsement of such a note is itself prima facie evidence of having been made for value. Riddle v. Mandeville, 5 Cranch, 322, 332.

The promissory note in the case at bar, having been made payable to the maker's own order, first took effect as a contract upon its indorsement and delivery by the maker, the Sheffield Furnace Company, to Witherow, the first taker. Lea v. Branch Bank, 8 Porter, 119; Little v. Rogers, 1 Met. 108; Hooper v. Williams, 2 Exch. 13; Brown v. DeWinton, 6 C. B. 336.

A guaranty of the payment of a negotiable promissory note, written by a third person upon the note before its delivery, requires no other consideration to support it, and need express none other (even where the law requires the consideration of the guaranty to be expressed in writing), than the consideration which the note upon its face implies to have passed between the original parties. Leonard v. Vredenburgh, 8 Johns. 29; DeWolf v. Rabaud, 1 Pet. 476, 501, 502; Nelson v. Boynton, 3 Met. 396, 400, 401; Bickford v. Gibbs, 8 Cush. 154; Nabb v. Koontz, 17 Md. 283; Parkhurst v. Vail, 73 Ill. 343.

The demurrers to the fourth and fifth pleas therefore were rightly sustained.

But a guaranty written upon a promissory note after the note has been delivered and taken effect as a contract requires a distinct consideration to support it; and if such a guaranty does not express any consideration it is void, where the Statute of Frauds, as in Alabama, requires the consideration to be expressed in writing. Leonard v. Vredenburgh, and other cases above cited; Rigby v. Norwood, 34 Ala. 129.

The demurrer to the twelfth plea, therefore, should have been overruled and judgment rendered thereon for the defendant, unless the court saw fit to permit the plaintiff to file a replication to that plea.

It was argued on behalf of the original plaintiff that the validity and effect of the guaranty must be governed by the general commercial law, without regard to any statute of Alabama. But there can be no doubt that the Statute of Frauds, even as applied to commercial instruments, is such a law of the State as has been declared by Congress to be a rule of decision in the courts of the United States. Act of September 24, 1789, c. 20, § 34, 1 Stat. 92; Rev. Stat. § 721; Mandeville *v.* Riddle, 1 Cranch, 290, and 5 Cranch, 322; DeWolf *v.* Rabaud, 1 Pet. 476; Kirkman *v.* Hamilton, 6 Pet. 20; Brashear *v.* West, 7 Pet. 608; Paine *v.* Central Vermont Rd. 118 U. S. 152, 161.

It was also contended that the order sustaining the demurrer, if erroneous, did not prejudice the defendant, because he might have availed himself of the defence of the Statute of Frauds under the general issue. That might have been true if he had pleaded the general issue. Kannady *v.* Lambert, 37 Ala. 57; Pollak *v.* Brush Electric Assoc. 128 U. S. 446. But he did not plead it, and had the right to rely on his special pleas only. Alabama Code, § 2675.

The suggestion of counsel that, by the practice in Alabama, the entry of an appearance of counsel for the defendant was equivalent to filing a plea of the general issue, is too novel to be accepted without proof, and seems inconsistent with Grigg *v.* Gilmer, 54 Ala. 425. If the record did not show what the pleadings were, it might be presumed that the general issue was pleaded. May *v.* Sharp, 49 Ala. 140; Hatchett *v.* Molton, 76 Ala. 410. But in this case twelve pleas are set forth in the record, and it cannot be assumed that there was any other.

The eighth plea was payment. The defendant introduced no evidence to support this plea, and has therefore

no ground of exception to the rulings and instructions at the trial of the issue joined thereon.

But the erroneous ruling on the demurrer to the twelfth plea requires the judgment to be reversed and the case remanded to the Circuit Court for further proceedings in conformity with this opinion.

PETTEE v. PROUT.

Supreme Court of Massachusetts, September, 1855. 3 Gray, 502.

Production of a note payable to A, or bearer, is sufficient evidence of the holder's title, though he is the general agent of A, who, the answer alleges, is the owner of the note.

One to whom a note payable to A, or bearer, is transferred before maturity, takes it subject to no rights of set-off which the maker might have against A.

Action of contract on a promissory note for $50, dated March 14, 1851, signed by the defendant, and payable in one year to the Cheshire Iron Works, or bearer, with interest. The defendant, in his answer, denied that the plaintiff was the owner and bearer of the note sued upon, and alleged that it was the property of the Cheshire Iron Works; and also filed a declaration in set-off upon the following note: '$49.74. Cheshire, June 11, 1851. Six months after date we promise to pay to the order of Gilman Bowker, forty-nine dollars $\frac{74}{100}$, value received, ten dollars of which is to be paid in goods, with interest.

'Cheshire Iron Works, by S. Pettee, General Agent.'

The case was submitted to the court upon a statement of facts, in which it was agreed that the plaintiff was the general agent of the Cheshire Iron Works; that the two notes were duly executed on the days of their respective dates; that the note in set-off was assigned by the holder thereof to the defendant, for a valuable consideration, with the intention of securing a debt against the Cheshire Iron Works; that the Cheshire Iron Works was insolvent, and

had no property; and that the stockholders, of whom the plaintiff was one, were individually liable for their debts.

There being no evidence to whom the note sued upon belonged, beyond the note itself, the defendant contended that the plaintiff had not proved his title to the note; and further contended that if he had, the note for $49.74 should be allowed in set-off.

SHAW, C. J., for the court. — The plaintiff brings his action, as bearer of a note made by the defendant to the Cheshire Iron Works, or bearer. He therefore claims as the holder of a negotiable promissory note, payable on time, and not dishonored; and if he establishes this title by proof, he is entitled to the same privileges and immunities as an indorsee having taken a note by indorsement in the course of business, before it has become due. He is not subject to any equities as between the promisor and the original payee, nor to the set-off of any debt, legal or equitable, which the promisor may afterwards acquire. Wheeler *v.* Guild, 20 Pick. 545. By giving a note payable to bearer at a future day, which is strictly a negotiable note, the defendant agreed to pay the amount to any person to whom it should be transferred, before the day of payment, without claiming to set off any demand which he then had or might have against the promisee. It is in this respect like mercantile notes (in use, we believe, in some of the States where the law allows set-offs and other equitable defences, even against indorsees of promissory notes), payable 'without defalcation,' thereby meaning, by force of the contract itself, to bind the maker to pay the amount absolutely to the regular holder, and renouncing any benefit of set-off or other equitable defence against the payee.

Then the question is as to the proof. Where a plaintiff brings the note declared upon in his hand, and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the

owner; and this will stand as proof of title, until other evidence is produced to control it. Ordinarily, such bearer, relying on the general presumption, has no means of proving the transfer of the note to himself.

The defendant contends that, as the plaintiff was the general agent of the corporation to whom the note was payable, and, as such, had the custody of all their notes, his possession may have been the possession of the corporation. But we think this fact alone is not sufficient to rebut the general presumption.

The demand relied on by the defendant is a note signed by the Cheshire Iron Works, payees of the note in suit, and payable to order; still it was not negotiable, because payable in part in goods. A negotiable note must be payable in money. But though the defendant could not sue on this note in his own name, yet we believe by the Rev. Sts. c. 96, § 5, as the assignee of a chose in action, the holder of such note might use it as a set-off, in a proper case, as against a suit brought by the debtor, in the same manner as if it were a legal debt. But it is unnecessary further to remark on the validity of the set-off; the ground of our decision is, that the plaintiff held the note in suit under such a title that no demand of the defendant, legal or equitable, against the Cheshire Iron Works could avail him as a set-off. *Judgment for the plaintiff.*

BURSON *v.* HUNTINGTON.

Supreme Court of Michigan, October, 1870. 21 Mich. 415.

A negotiable instrument has no legal existence until it has been delivered; that, too, even in the hands of a bona fide purchaser for value.

Assumpsit against the defendant as maker of a negotiable promissory note, payable to the order of A. N. Goldwood, and by him indorsed to the plaintiff for value, and, as certain disputed evidence tended to show, in good faith, with-

out notice of the facts set up in defence. The note was made in negotiations with Goldwood for the purchase by the maker of an interest in a patent right.

The defendant made affidavit denying the delivery of the note,[1] affirming therein that the instrument sued upon 'was never delivered by this defendant to the said A. N. Goldwood, mentioned in said written instrument, nor to any other person for the said A. N. Goldwood, or any other person, and that this defendant never authorized any other person to deliver the written instrument for him this defendant to the said A. N. Goldwood, or to any other person; . . . that said written instrument was taken from the house of this defendant, in this defendant's absence from the same, by the said A. N. Goldwood, without the knowledge or consent of the deponent at the time.' There was evidence tending to support this, for which see the opinion.

Counsel for the defendant asked for the following charge, in substance, to the jury: If they find that A. N. Goldwood, the payee, took this note after it was drawn and signed by the defendant without the knowledge and against the will and consent of the defendant, and before the defendant had delivered the note to any person, the note thus obtained would be void in the hands of Goldwood, and in the hands of any subsequent holder deriving possession from him, whether for value or not; and that the note, if not delivered by the defendant or by his authority, had no legal existence, and was therefore void.

The court declined to charge as thus requested, and under the charge given the jury found for the plaintiff. Writ of error by the defendant. [Facts foreign to the present purpose are omitted.]

CHRISTIANCY, J., for the court. — . . . .

But this note was indorsed by Goldwood, the payee, to the plaintiff, before maturity, for a valuable consideration, and, as plaintiff claims, in good faith and without notice

[1] Under statute relating to denial of execution on oath.

of a want of delivery or of consideration, or any other circumstance tending to invalidate it in the hands of Goldwood; and his evidence tended to show this, though there was evidence of some circumstances tending to show that he had notice of the circumstances under which the paper had been obtained.

There was also evidence on the part of the defendant strongly tending to show that the note never was delivered by the defendant, but that Goldwood, to whose order it was drawn, was endeavoring to sell to the defendant a patent right, or the right of certain territory under it, and that the parties had so far progressed towards the making of an arrangement to this end that it was understood and verbally agreed that Goldwood was to give him a deed of certain territory upon defendant's executing to him a note for the amount, with some other person signing it as surety. That the parties being in the defendant's house, and the defendant's sister being present, Goldwood wrote this note and defendant signed it; but as a surety was to be obtained, he laid the note on the table and went out to find his uncle for that purpose, telling Goldwood, as he went out, not to touch it till he came back; but that while defendant was gone Goldwood picked up the paper and started out doors with it; that defendant's sister then told him to let the note be on the table till defendant should come back, to which Goldwood replied he was going to have the note, and went off with it, without giving any deed of territory or anything else for it. That the note, at this time, was not stamped,[1] and defendant never stamped or authorized it to be stamped; that some four days after, Goldwood wrote to defendant requesting him to come immediately to Kalamazoo 'and sign stamp on the note,' and saying if defendant was not there by Tuesday evening, 'I shall consider that you refuse your signature, and shall act accordingly.' The evidence also tended to show that defendant called upon Goldwood about that time, while the latter had the note, and

[1] As was required at that time by act of Congress.

demanded it, accusing him of stealing it, to which Goldwood replied, 'Never mind, we can fix that up,' and said he was ready to do as he had agreed, and wanted defendant to get another signer and he would give him a deed of territory; but defendant said he did not want the deed, but wanted the note. Goldwood refused to return the note, or to give a deed till he got another signer.

These facts, if found by the jury, would show, not only that the note was never delivered to the payee, and that it therefore never had a legal existence as a note between the original parties, but that there was yet no completed or binding agreement of any kind, and was not to be until defendant should choose to get a surety on the note and the payee should give him a deed of territory. Until thus completed, the defendant had a right to retract.

As a general rule a negotiable promissory note, like any other written contract, has no legal inception or valid existence, as such, until it has been delivered in accordance with the purpose and intent of the parties. See Edwards on B. and N. 175, and authorities cited, and 1 Pars. on B. and N. 48 and 49, and cases cited; and see Thomas *v.* Watkins, 16 Wis. 549; Mahon *v.* Sawyer, 18 Ind. 73; Carter *v.* McClintock, 29 Mo. 464. Delivery is an essential part of the making or execution of the note, and it takes effect only from delivery (for most purposes); and if this be subsequent to the date, it takes effect from the delivery and not from the date. 1 Pars. ubi supra. This is certainly true as between the original parties.

But negotiable paper differs from ordinary written contracts in this respect, that even a wrongful holder, between whom and the maker or indorser the note or indorsement would not be valid, may yet transfer to an innocent party, who takes it in good faith, without notice, and for value, a good title as against the maker or indorser. And the question in the present case is, how far this principle will dispense with delivery by the maker.

When a note payable to bearer, which has once become

operative by delivery, has been lost or stolen from the owner, and has subsequently come to the hands of a bona fide holder for value, the latter may recover against the maker and all indorsers on the paper when in the hands of the loser; and the loser must sustain the loss. In such a case there was a complete legal instrument; the maker is clearly liable to pay it to some one, and the question is only to whom. But in the case before us, where the note had never been delivered, and therefore had no legal inception or existence as a note, the question is whether he is liable to pay at all, even to an innocent holder for value.

The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the *theft* or wrongful *seizure* of this paper *create* a valid contract on the part of the maker against his will, where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that, in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note.

But it is urged that this case falls within the general principle, which has become a maxim of law, that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.[1] This is a principle of manifest justice when confined within its proper limits. But the principle, as a rule, has many exceptions; and the point of difficulty in its application consists in determining what acts or conduct of the party sought to be charged can properly be said to have 'enabled the third person to occasion the loss,' within the meaning of the rule. If I leave

[1] See Bills and Notes (Students' Series), pp. 178, 179, 180.

my horse in the stable or in the pasture, I cannot properly be said to have enabled the thief to steal him, within the meaning of this rule, because he found it possible to steal him from that particular locality. And upon examination it will be found that this rule or maxim is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose acts have occasioned the loss, or in some other intermediate person whose acts or negligence have enabled such third person to occasion the loss;[1] and that the party has been held responsible for the acts of those in whom he had trusted upon grounds analogous to those which govern the relation of principal and agent; that the party thus reposing confidence in another with respect to transactions by which the rights of others may be affected, has, as to the persons to be thus affected, constituted the third person his agent in some sense, and having held him out as such, or trusted him with papers or indicia of ownership which have enabled him to appear to others as principal, as owner, or as possessed of certain powers, the person reposing this confidence is, as to those who have been deceived into parting with property or incurring obligations on the faith of such appearances, to be held to the same extent as if the fact had accorded with such appearances.

Hence, to confine ourselves to the question of delivery, the authorities in reference to lost or stolen notes which have become operative by delivery, have no bearing upon the question. If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, or voluntarily deliver it to the payee, or (if payable to bearer) to any other person for a special purpose only, as to be taken to or discounted by a particular bank, or to be carried to any particular place or person, or to be used only in a certain way, or upon certain conditions not apparent upon the face of the paper, and the person to whom it is

[1] See Bills and Notes (Students' Series), pp. 175, 176, 191, 192.

thus intrusted violate the confidence reposed in him and put the note into circulation; this, though not a valid delivery as to the original parties, must, as between a bona fide holder for value and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such bona fide holder; or if the note be sent by mail and get into the wrong hands, as the party intended to deliver to some one, and selects his own mode of delivery, he must be responsible for the result. These principles are too well settled to call for the citation of authorities, and manifestly it will make no difference in this respect if the note or indorsement were signed in blank, if the maker or indorser part with the possession or authorize a clerk or agent to do so, and it is done. 1 Parsons on Bills and Notes, 109–114, and cases cited, especially Putnam *v.* Sullivan, 4 Mass. 45, which was decided expressly upon the ground of the confidence reposed in the third person, as to the filling up, and in the clerks as to the delivery.

And when the maker or indorser has himself been deceived by the fraudulent acts or representations of the payee or others, and thereby induced to deliver or part with the note or indorsement, and the same is thus fraudulently obtained from him, he must doubtless, as between him and an innocent holder for value, bear the consequences of his own credulity and want of caution. He has placed a confidence in another, and by putting the papers into his hands has enabled him to appear as the owner and to deceive others. Cases of this kind are numerous; but they have no bearing upon the wrongful taking from the maker when he never voluntarily parted with the instrument. Much confusion, however, has arisen from the general language used in the books, and sometimes by judges, in reference to cases where the maker has voluntarily parted with the possession, though induced to do so by fraud; where it is laid down as a general rule that it is no defence for a maker, as against a bona fide holder,

to show that the note was wrongfully or fraudulently obtained, without attempting to distinguish between cases where the maker has actually and voluntarily parted with the possession of the note, and those where he has not.

We do not assert that the general rule we are discussing — that 'where one of two innocent parties must suffer,' etc. — must be confined exclusively to cases where a confidence has been placed in some other person (in reference to delivery) and abused. There may be cases where culpable negligence or recklessness of the maker in allowing an undelivered note to get into circulation might justly estop him from setting up non-delivery; as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abduction under circumstances when he might reasonably apprehend that it would be likely to be taken.[1]

Upon this principle the case of Ingham *v.* Primrose, 7 C. B. N. S. 82, was decided, where the acceptor tore the bill into halves (with the intention of cancelling it) and threw it into the street, and the drawer picked them up in his presence and afterwards pasted the two pieces together and put them into circulation. See also by analogy Foster *v.* Mackinnon, L. R. 4 C. P. 704.[2] But the case before us is one of a very different character, — no actual delivery by the maker to any one for any purpose.

The evidence tends to show that when he left the room in his own house, the note being on the table, and his sister remaining there, he did not confide it to the custody of the payee, but told him not to take it, and no final agreement between them had yet been made and no consideration given. Under such circumstances he can no more be said to have trusted it to the payee's custody or confidence than that he trusted his spoons or other household goods to his custody or confidence; and there was no more apparent reason to suppose he would take and carry off the one than the other.

[1] See Bills and Notes (Students' Series), pp. 176, 177. [2] Post, 237

The maker therefore cannot be held responsible for any negligence; there was nothing to prove negligence, unless he was bound to suspect and treat as a knave, a thief, or a criminal the man who came to his house apparently on business, because he afterwards proved himself to be such. This, we think, would be preposterous. We therefore see no ground upon which the defendant could be held liable on a note thus obtained, even to a bona fide holder for value. He was guilty of no more negligence than the plaintiff who took the paper, and the plaintiff shows no right or equities superior to those of the defendant.

Such, we think, must be the result upon principle. We have carefully examined the cases, English and American, and are satisfied there is no adjudged case in the English courts, so far as their reports have reached us, which would warrant a recovery in the present case. Some dicta may be found the general language of which might sustain the liability of the maker; such as that of Alderson, B., in Marston *v.* Allen, 8 Mees. & W. 494, cited by Duer, J., in Gould *v.* Segee, 5 Duer, 260, and that used by Williams, J., in Ingham *v.* Primrose, 7 C. B. N. S. 82. But a reference to the cases will show that no such question was involved, and that these remarks were wholly outside of the case. On the other hand Hall *v.* Wilson, 16 Barb. 548, 555, and 556, contains a dictum fully sustaining the views we have taken.

There are, however, two recent American cases where the note or indorsement was obtained without delivery under circumstances quite as wrongful as those in the present case, in one of which the maker, and in the other the indorser, was held liable to a bona fide holder for value. Shipley *v.* Carroll, 45 Ill. 285 (case of maker), and Gould *v.* Segee, 5 Duer, 260. But in neither of these cases can we discover that the court discussed or considered the real principle involved; and we have been unable to discover anything in the cases cited by the court to warrant the decision. It is possible that the case in Illinois may depend somewhat upon their statute, and the note being

made as a mere matter of amusement, and the making not being justified by any legitimate pending business, the maker might perhaps justly be held responsible for a higher degree of diligence, and therefore more justly chargeable with negligence under the particular circumstances, than the maker in the present case.

There is another case (Worcester Co. Bank *v.* Dorchester and Milton Bank, 10 Cush. 488) where bankbills were stolen from the vault of the bank, which though signed and ready for use, had never yet been issued, and on which a bona fide holder for value was held entitled to recover. This, we are inclined to think, was correct. The court intimated a doubt whether the same rule should apply to bankbills as to ordinary promissory notes, and as to the latter failed to make any distinction between the question of delivery and questions affecting the rights of the parties upon notes which have become effectual by delivery. But we think bankbills, which circulate universally as cash, passing from hand to hand perhaps a hundred times a day, without such inquiries as are usual in the cases of ordinary promissory notes of individuals, stand upon quite different grounds. And considering the temptations to burglars and robbers, and the much greater facility of passing them off to innocent parties without detection and identification of the bills or the parties, and that the special business of banks is dealing in and holding the custody of money and bank-bills, it is not unreasonable to hold them to a much higher degree of care, and to make them absolutely responsible for their safe keeping. We do not therefore regard this case as having any material bearing upon the case before us.

We think the Circuit Court erred in refusing to charge upon this point as requested by the defendant below.

. . . . . .

[Concerning want of stamp and 'other minor questions' not considered].

The judgment must be reversed with costs, and a

New trial awarded.

FOSTER *v.* MACKINNON.

Common Pleas of England, July, 1869. L. R. 4 C. P. 704.

No liability is incurred by a person's indorsing paper upon the fraudulent representation that the writing on the opposite side is a guaranty now renewed for one previously made by the same person, in the absence of negligence by him in so indorsing.

Action by indorsee against indorser on a bill of exchange for £3,000, drawn on the 6th of November, 1867, by one Cooper upon and accepted by one Callow, payable six months after date, and indorsed successively by Cooper, the defendant, J. P. Parker, T. A. Pooley & Co., and A. G. Pooley, to the plaintiff, who became the holder for value (having taken it in part-payment of a debt due to him from A. G. Pooley) before it became due, and without notice of any fraud.

The pleas traversed the several indorsements, and alleged that the defendant's indorsement was obtained from him by fraud.

The cause was tried before Bovill, C. J., at the last spring assizes at Guildford. The defendant, who was a gentleman far advanced in years, swore that the indorsement was not in his handwriting, and that he had never accepted nor indorsed a bill of exchange; but there was evidence that the signature was his; and Callow, who was called as a witness for the plaintiff, stated that he saw the defendant write the indorsement under the following circumstances: Callow had been secretary to a company engaged in the formation of a railway at Sandgate, in Kent, in which the defendant (who had property in the neighborhood) was interested; and the defendant had some time previously, at Callow's request, signed a guaranty for £3,000, in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question (which was drawn and indorsed by Cooper) to the defendant, and asked him to put his name on it,

telling him it was a guaranty; whereupon the defendant, in the belief that he was signing a guaranty similar to that which he had before given (and out of which no liability had resulted to him), put his signature on the back of the bill, immediately after that of Cooper. Callow only showed the defendant the back of the paper; it was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper.

The Lord Chief Justice told the jury that, if the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict.

The jury returned a verdict for the defendant. Rule nisi for a new trial.

In the course of the argument of Sir J. D. Coleridge, Solicitor General, in favor of the rule, the following was said: [Brett, J. Nance *v.* Lary (5 Ala. 370, cited in Parsons on Bills, 114) seems to be very much to the purpose. In that case, the defendant and one Langford being about to execute a bond in blank, the latter produced a sheet of paper, upon which the defendant signed his name; whereupon Langford suggested that the signature was so far from the bottom of the paper that there might not be room for the bond to be written above it, and produced another sheet for the defendant to sign so as to leave sufficient room for the intended bond. Langford, with apparent carelessness, slipped the first sheet aside, and signed the other with the defendant, who carried it to the clerk of the court to be filled up, leaving the former with Langford, under the impression that it had been or would be destroyed. Subsequently, Langford caused the note upon which the present suit was brought to be written over the

blank signature of the defendant retained by him, and negotiated it to the plaintiff. Collier, C. J., said: 'The making of the note by Langford was not a mere fraud upon the defendant; it was something more. It was quite as much a forgery as if he had found the blank, or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who indulges in the idle habit of writing his name for mere pastime, or leaves sufficient space between a letter and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction.']

The Solicitor-General then citing Swan *v.* North British Australasian Co., 2 H. & C. at p. 184, that 'honest acquisition confers title,' [Byles, J. If that be right, it can only be with reference to the case of a complete instrument; it can hardly be applicable to a case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign.]

Cur. adv. vult.

Byles, J., for the court. — This was an action by the plaintiff as indorsee of a bill of exchange for £3,000 against the defendant as indorser. The defendant by one of his pleas traversed the indorsement, and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud.

There was contradictory evidence as to whether the indorsement was the defendant's signature at all; but, according to the evidence of one Callow, the acceptor of the bill, who was called as a witness for the plaintiff, he, Callow, produced the bill to the defendant, a gentleman advanced in life, for him to put his signature on the back, after that of one Cooper, who was payee of the bill and first indorser, Callow not saying that it was a bill, and

telling the defendant that the instrument was a guaranty. The defendant did not see the face of the bill at all. But the bill was of the usual shape, and bore a stamp, the impress of which stamp was visible at the back of the bill. The defendant signed his name after Cooper's, he, the defendant (as the witness stated), believing the document to be a guaranty only.

The Lord Chief Justice told the jury that, if the indorsement was not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict. The jury found for the defendant.

A rule nisi was obtained for a new trial: first, on the ground of misdirection in the latter part of the summing up; and, secondly, on the ground that the verdict was against the evidence.

As to the first branch of the rule, it seems to us that the question arises on the traverse of the indorsement. The case presented by the defendant is, that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing; and that his mind never went with his act.

It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence,

the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

The authorities appear to us to support this view of the law. In Thoroughgood's Case, 2 Co. Rep. 9 *b*, it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to Thoroughgood's Case, 2 Co. Rep. 9 *b*, in Fraser's edition of Coke's Reports, it is suggested that the doctrine is not confined to the condition of an illiterate grantor; and a case in Keilwey's Reports (Keilw. 70, pl. 6) is cited in support of this observation. On reference to that case, it appears that one of the judges did there observe that it made no difference whether the grantor were lettered or unlettered. That, however, was a case where the grantee himself was the defrauding party. But the position that if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities: see Com. Dig. Fait, B. 2; and is recognized by Bayley, B., and the Court of Exchequer, in the case of Edwards *v.* Brown, 1 C. & J. 312. Accordingly, it has recently been decided in the Exchequer Chamber that, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor. Swan *v.* North British Australasian Land Company, 2 H. & C. 175.

These cases apply to deeds; but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary

to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.

In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature; then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case, the signer would not have been bound by his signature, for two reasons: first, that he never in fact signed the writing declared on; and, secondly, that he never intended to sign any such contract.

In the present case, the first reason does not apply, but

the second reason does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument.

We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed. In the case of Ingham *v.* Primrose, 7 C. B. N. S. 83; 28 L. J. C. P. 294, and the case of Nance *v.* Lary, 5 Ala. 370, cited 1 Parsons on Bills, 114, n., both cited by the plaintiff, the facts were very different from those of the case before us, and have but a remote bearing on the question. But, in Putnam *v.* Sullivan, an American case, reported in 4 Mass. 45, and cited in Parsons on Bills of Exchange, vol. i. p. 111, n., a distinction is taken by Chief Justice Parsons between a case where an indorser intended to indorse such a note as he actually indorsed, being induced by fraud to indorse it, and a case where he intended to indorse a different note and for a different purpose. And the court intimated an opinion that even in such a case as that, a distinction might prevail and protect the indorsee.

The distinction in the case now under consideration is a much plainer one; for, on this branch of the rule, we are to assume that the indorser never intended to indorse at all, but to sign a contract of an entirely different nature.

For these reasons, we think the direction of the Lord Chief Justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We abstain from giving our reasons for this part of our decision only lest they should prejudice either party on a second inquiry.

The rule, therefore, will be made absolute for a new trial. *Rule absolute.*

ALDOUS *v.* CORNWELL.

Queen's Bench of England, Trinity, 1868. L. R. 3 Q. B. 573.

An alteration expressing only the effect in law of the instrument as it stood before will not affect the validity of the same.

Declaration that the defendant, on the 8th of November, 1865, by his promissory note, promised to pay the plaintiff £125 on demand. Plea, that the defendant did not make the note as alleged.

At the trial the following promissory note, signed by the defendant, was put in evidence:

'November 8th, 1865.

'On demand.

I promise to pay Mr. Ed. Aldous the sum of £125.'

But it was proved that the promissory note, when delivered to the plaintiff, did not contain the words 'On demand,' and that these words had been inserted while the note was in the possession of the plaintiff, the payee, without the knowledge of the defendant, but there was no positive evidence to show by whom the alteration was made. The learned judge directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant, if the note was made void by the alteration. Rule obtained accordingly.

Lush, J., for the court. — This was an action by the payee against the maker of a promissory note, expressed to be payable on demand. The plea denied the making of the note.

At the trial before the late Mr. Justice Shee it was proved that the words 'on demand' were added after the note had been delivered to the plaintiff. It did not appear who made the alteration, but it was assumed to have been made by the plaintiff, and no question was raised as to this fact. The learned judge directed a verdict for the

plaintiff, reserving the point whether by such an alteration the note was rendered void. No objection having been made to the pleadings, we must consider the case as if the question had been properly raised on the record.

It was admitted, and properly so, on the argument, that the addition of these words did not alter the legal effect of the instrument, but only expressed what the law would otherwise have implied. But it was contended, upon the authority of Pigot's Case, 11 Rep. 26 *b*. and Master *v.* Miller, 4 T. R. 320; 1 Sm. L. C. 796, that the alteration, having been made by the payee and holder, though in a matter not material, avoided the instrument.

In Pigot's Case it is said, 'If the obligee himself alters the deed by any of the said ways (viz. by interlineation, addition, erasing, or by drawing a pen through the line, etc.), although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed.' For this proposition Dyer, 9 Eliz. fol. 261 *b*, is cited. Shep. Touch. vol. 1, p. 68, is to the same effect. It was found as a fact in Pigot's Case that the alteration, which was not a material one, was made by a stranger, and judgment was given for the plaintiff, so that the case itself is not a decision upon the point in question. Master *v.* Miller extended the doctrine, as regards material alterations, to bills of exchange; and subsequent cases have applied it indiscriminately to all written instruments, whether under seal or not. See Davidson *v.* Cooper, 11 Mees. & W. 778; in error, 13 Mees. & W. 343. No authority was cited, nor are we able to find one, in which the doctrine has been acted upon and an instrument held to be avoided by an immaterial alteration. There are cases to the contrary, though we cannot regard them as entirely satisfactory. Thus, in Lord Darcy and Sharpe's Case, 1 Leon., an alteration in a bond not material, made by the executor of the obligee, was held not to vitiate the bond. But the court seemed to lay

stress on the fact that the alteration was in favor of the obligor.

In Sanderson *v.* Symonds, 1 Ball & B. 426, the holder of a policy of insurance on a ship, on a voyage to the coast of Africa, during her stay there, and back to Liverpool, with liberty to 'touch and stay at any port or places to sell, barter, and exchange, and load and unload and reload at any of the ports and places she may call at,' had, fearing that these words might not be sufficiently extensive for his purpose, added after the words 'during her stay' the words 'to trade.' Several of the underwriters had initialed the alteration, but the defendant refused to do so, on the ground that he never underwrote trading policies to Africa, and he offered before the loss to cancel his subscription and return the premium rather than assent to such an alteration. The plaintiff refused to accept this offer, and held to the policy. The ship was afterwards lost, and the plaintiff sued the defendant for his subscription; the defendant resisted the action on the ground that the alteration avoided the policy so far as he was concerned. It is to be observed here that both parties thought the alteration material at the time it was made. The court, however, held that the words so added expressed no more than was already contained in the policy as signed by the defendant, and therefore that the defendant was not discharged. This case might have been cited as conclusive upon the question before us but for the reasons assigned by the different members of the court for their judgment. Dallas, C. J., said that the rule was intended not so much to guard against fraud as to insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned. 'But the present case,' he said, 'stands on its own circumstances. The instrument is a policy of insurance signed by a number of individuals wholly unconnected in interest, and between whom no privity can exist. Indeed, it has never been contended that this was an alteration without

the privity of the party; and the old cases turn entirely on alteration made without the privity of the party. Here the instrument was shown to all the parties concerned. Those who put their initials to the alteration thereby expressly signified their consent to it; those who refused to do so expressed their denial by the absence of their initials. But the latter were bound by the policy as it stood at first, the former by the policy in its altered state.' Park, J., said, 'In all the cases on policies the court refers to the materiality of the alterations. The alteration here is immaterial; the risk stands as it stood before, and the writing immaterial words does not vacate the policy.' And Burrough and Richardson, JJ., base their judgment on the fact that the risk was not varied by the alteration.

Had the alteration in that case been a material one, the fact that some of the underwriters had assented to it, and that it had been shown to those who refused[1] their assent, would not have prevented the operation of the rule as against the latter. This had been decided in two prior cases in the same court, Langhorn *v.* Cologan[2] and Fairlie *v.* Christie,[3] in each of which the dissentient underwriters had been held to be discharged by a material alteration in the policy, though they had been asked to join others who had assented and had refused to do so. The judgment of Dallas, C. J., cannot therefore stand upon that ground, and it is obvious the real ground of the decision in Sanderson *v.* Symonds was that the defendant was not and could not be prejudiced by the alteration. Why the court should have limited the doctrine they there laid down to policies of insurance it is not easy to understand. We cannot discover any reason for making a distinction between that and any other species of contract.

Another case is that of Catton *v.* Simpson, 8 Ad. & E. 136; there the plaintiff had joined the defendant as his

[1] Printed 'expressed,' but corrected in 'Erratum' of the volume.

[2] 4 Taunt. 330. [3] 7 Taunt. 416.

surety in a joint and several promissory note. The payee, having pressed the defendant for payment, had consented to give time on his procuring a third person to add his name to the note. The plaintiff, who had afterwards paid a moiety of the amount, sued the defendant for re-payment, and it was objected that, as the name of the third party had been added without the plaintiff's consent, he had been discharged and had paid the money in his own wrong. Patteson, J., who tried the cause, directed a verdict for the plaintiff; and the court refused a rule for a new trial, holding 'that it was not an alteration of the note, but an addition which had no effect.' It is true that in the subsequent case of Gardner *v.* Walsh, 5 El. & B. 83, this court expressly overruled Catton *v.* Simpson, not however on the ground that an immaterial alteration vacated the instrument, but on the ground that the alteration was a material one.

This being the state of the authorities, we think we are not bound by the doctrine in Pigot's Case or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one destroys the validity of the note. It seems to us repugnant to justice and common-sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written. We therefore discharge the rule.

Rule discharged.

BANK OF COMMERCE *v.* UNION BANK.

Court of Appeals of New York, April, 1850. 3 Comst. 230.

The drawee of a bill of exchange in paying it is not bound to know whether the body of the bill is genuine.

Assumpsit by the drawee of a bill of exchange against the late holder to recover the amount thereof paid to him, as paid under mistake of fact. The bill as originally drawn was a request to the plaintiff to pay 'one hundred and five dollars to the order of J. Durand.' After it was delivered the word 'hundred' was fraudulently altered to 'thousand,' and the name 'Durand' to 'Bonnet.' J. Bonnet now indorsed it for value and without notice to the State Bank of Charleston, which sent it for collection to the defendant; to which the plaintiff paid it at sight, in ignorance of the alterations. The alterations having afterwards come to light, the plaintiff demanded of the defendant the return of the money, which was refused.

The court below charged the jury that on such facts the plaintiff would be entitled to recover. The defendant excepted. Judgment for the plaintiff; appeal by the defendant.

Ruggles, J., for the court. — The payment of a bill of exchange by the drawee is ordinarily an admission of the drawer's signature, which he is not afterwards, in a controversy between himself and the holder, at liberty to dispute; and therefore if the drawer's signature is on a subsequent day discovered to be a forgery, the drawee cannot compel the holder to whom he paid the bill to restore the money unless the holder be in some way implicated in the fraud. Price *v.* Neal, 3 Burr. 1354.[1] This rule is founded on the supposed negligence of the drawee in failing, by an examination of the signature when the bill is presented, to detect the forgery and refuse payment.

[1] Post, p. 267.

The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payer, from his imputed negligence, must bear the loss. In Price *v.* Neal the plaintiff had paid to Neal, the holder, two bills of exchange purporting to be drawn on him by Sutton, whose name was forged. On discovery of the forgery Price brought his action against Neal to recover back the money as paid by mistake. Lord Mansfield, in delivering the opinion of the court in favor of the defendant, said 'it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it, but it was not incumbent upon the defendant to inquire into it.' 'Whatever neglect there was, was on his side. It is a misfortune which has happened without the defendant's fault or neglect.'

In Wilkinson *v.* Lutwidge, 1 Strange, 648, Lord Chief Justice Pratt was of opinion that 'acceptance was a sufficient acknowledgment of the drawer's handwriting on the part of the acceptor, who must be supposed to know the hand of his own correspondent.' So the acceptance of a bill, whether general, or for honor, or supra protest, *after sight of the bill*, admits the genuineness of the signature of the drawer; and consequently if the signature of the drawer turns out to be a forgery, the acceptance will nevertheless be binding, and entitle a bona fide holder for value and without notice to recover thereon according to its tenor.[1] Story on Bills, § 262.

But it is plain that the reason on which the above rule is founded does not apply to a case where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill. There is no ground for presuming the body of the bill to be in the drawer's handwriting,

[1] This language should be noticed; it is not stated that acceptance *warrants* the genuineness of the signature, but that it 'admits' it, and is 'binding' in favor of an innocent purchaser. See Bills and Notes (Students' Series), 76–79.

or in any handwriting known to the acceptor. In the present case that part of the bill is in the handwriting of one of the clerks in the office of the Canal and Banking Company in New Orleans. The signature was in the name and handwriting of the cashier. The signature is genuine. The forgery was committed by altering the date, number, amount, and payee's name. No case goes the length of saying that the acceptor is presumed to know the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous but unjust. The drawee would undoubtedly be answerable for negligence in paying an altered bill, if the alteration were manifest on its face. Whether it was so or not in this case was properly submitted to the jury, who found that it was paid by mistake and without knowledge of or reason to suspect the fraudulent alterations. It would have been difficult to find otherwise upon the evidence, the bill having passed through the defendants' bank and the Charleston bank without suspicion. If the forgery had been in the name of the drawer, it might not perhaps have been incumbent on those banks to scrutinize the bill, because they might have relied on the drawer's better knowledge of the hand; but the forgery being in the body of the bill, the plaintiffs were not more in fault than the defendants.

The greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery. So far as respects the genuineness of the bill, each indorser receives it on the credit of the previous indorsers; and it was the interest and duty, in the present case, of the Bank of Charleston to satisfy itself that the

bill was genuine, or that its immediate indorser was able to respond in case the bill should prove to be spurious. The party who fraudulently passed the bill cannot avoid his liability to refund on the pretence of delay in detecting the forgery or in giving notice of it; and if reasonable diligence is exercised in giving notice after the forgery comes to light, it is all that any of the parties can require. Canal Bank *v.* The Bank of Albany, 1 Hill, 287, 292, 293.

In Smith *v.* Mercer, 6 Taunt. 76, in Cocks *v.* Masterman, 9 Barn. & C. 902, and in Price *v.* Neal, 3 Burr. 1354, the plaintiffs who paid the forged bills, being chargeable with a knowledge of the signature of the drawer (which was forged), were held to have paid it negligently and without due caution and examination, and on that ground it was that the defendants to whom they paid the money were held not liable without immediate notice of the forgery. But in the present case no such negligence is imputable to the plaintiffs, the plaintiffs being no more capable of detecting the forged alteration by inspection of the bill than either of the other parties.

This action is not founded on the bill as an instrument containing the contract on which the suit is brought. The acceptor can never have recourse on the bill against the indorsers. But the plaintiff's right of recovery rests on equitable grounds. In the Canal Bank *v.* The Bank of Albany the principle was recognized, that money paid by one party to another through mutual mistake of facts in respect to which both were equally bound to inquire, may be recovered back. The defendants here, as in that case, have obtained the money of the plaintiff without right and on the exhibition of a forged title as genuine, the forgery being unknown to both parties. The defendants ought not in conscience to retain the money, because it does not belong to them; and for the further reason that the defendants and the previous indorsers have each, on the same principle, 'their remedy over against the party to whom they respectively paid the money, until the wrong-doer is

finally made to pay. If that party should be irresponsible, or if he cannot be found, the loss ought to fall on the party who, without due caution, took the bill from him.

In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within the ordinary time to charge the previous parties to the bill is excused, provided notice of the forgery be given as soon as it is discovered.

Judgment affirmed.

WOOD *v.* STEELE.

Supreme Court of United States, December, 1867. 6 Wall. 80.

Alteration of the date of a promissory note by a party to it, after signature and delivery by the signer, without his consent, destroys the note as a contract by him.

The case is stated in the opinion.

SWAYNE, J., for the court. — The action was brought by the plaintiff in error upon a promissory note made by Steele and Newson, bearing date October 11th, 1858, for $3,720, payable to their own order one year from date, with interest at the rate of two per cent per month, and indorsed by them to Wood the plaintiff.

Upon the trial it appeared that Newson applied to Allis, the agent of Wood, for a loan of money upon the note of himself and Steele. Wood assented, and Newson was to procure the note. Wood left the money with Allis, to be paid over when the note was produced. The note was afterwards delivered by Newson and the money paid to him. Steele received no part of it. At that time it appeared on the face of the note that 'September' had been stricken out and 'October 11th' substituted as the date. This was done after Steele had signed the note, and without his knowledge or consent. These circumstances were unknown to Wood and to Allis. Steele was the

surety of Newson. It does not appear that there was any controversy about the facts. The argument being closed, the court instructed the jury 'that if the said alteration was made after the note was signed by the defendant Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note.' The plaintiff excepted. The jury found for the defendant, and the plaintiff prosecuted this writ of error to reverse the judgment.

Instructions were asked by the plaintiff's counsel, which were refused by the court. One was given with a modification. Exceptions were duly taken, but it is deemed unnecessary particularly to advert to them. The views of the court as expressed to the jury covered the entire ground of the controversy between the parties.

The state of the case, as presented, relieves us from the necessity of considering the questions, upon whom rested the burden of proof, the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank left after the month exonerates the maker who has not assented to it.

Was the instruction given correct?

It was a rule of the common law as far back as the reign of Edward III. that a rasure in a deed avoids it. Brooke's Abridgment, Faits, pl. 11. The effect of alterations in deeds was considered in Pigot's Case, 11 Coke, 27, and most of the authorities upon the subject down to that time were referred to. In Master *v.* Miller, 4 T. R. 320; 1 Smith's L. C. 1141, the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of the date,

whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson cannot affect the result. He had no authority to change the date.

The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed; another is substituted without his consent, and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed; and if it be not under seal, that he did not so promise. In either case the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy it annuls the instrument, as to the party sought to be charged.

The rules that where one of two innocent persons must suffer he who has put it in the power of another to do the wrong must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned deals with it accordingly.

The instruction was correct and the

Judgment is affirmed.

WORRALL *v.* GHEEN.

Supreme Court of Pennsylvania, 1861. 39 Penn. St. 388.

Law of Penn. by Stat.

In a case stated, of suit upon a raised negotiable promissory note by a bona fide holder for value against one who indorsed it before the alteration, *held*, that the plaintiff might recover the sum for which the note was originally made.

Assumpsit by the holder against the first indorser of a negotiable promissory note. The following special verdict was rendered:

'Charles M. Layman filled up a printed blank note in the following manner and in the following terms. The annexed is a correct copy as it was executed by him:

'October 14, 1857.

$50.

'*Thirty* days after date, I promise to pay to the order of *Levi A. Gheen*, at the Bank of Chester County, fifty $\frac{}{100}$ Dollars, without defalcation, for value received.

Credit the drawer, C. M. Layman.

Levi A. Gheen.

'Layman called upon Gheen with the note, and requested him to indorse it. Gheen did so, by writing his name across the back of the note, and signed his name under the words "Credit the drawer." Layman then took the note away and fraudulently altered its amount from fifty dollars to one hundred and fifty dollars, by adding the figure "1" between the $ and the figure "50," and the words "One hundred &" before the word "fifty."

'The fraud was so well executed that the appearance of the note was not such as to excite the suspicions of a man in ordinary business. On inspection a difference in the color of the ink with which the words "One hundred &" were written may be perceived.'

The plaintiff discounted the note before maturity for value and without knowledge of the alteration, and without notice thereof further than the foregoing facts indicate. Due steps were taken to fix the defendant's liability as indorser.

Judgment below ordered for the defendant; the plaintiff sued out a writ of error.

LOWRIE, C. J., for the court. — We are not able to follow the cases of Pagan *v.* Wylie and Graham *v.* Gillespie, Ross on Bills and Notes, 194, 195, in the principal point decided there. And yet we would not be understood as denying the case of Young *v.* Grote in the same book, p. 187, 4 Bing. 253. It may be that a cheque on a banker, so written as to be easily altered by the bearer of it, ought to be treated in the same manner as instructions sent by a principal to his agent, wherein the latter is not allowed to suffer from the carelessness of the former.[1] Thus probably alterations in cheques may be properly distinguished from those in bills, notes, and other contracts. We doubt it, however.

This is a case of a printed form of a promissory note, filled up by the maker, and then indorsed for his accommodation by another, and then altered by the maker to a larger sum by taking advantage of some vacant space left in the form. If the sum had been left entirely blank, the inference would have been that the parties authorized the holder as their agent in filling it in, and they would have been bound accordingly. But where a sum is actually written, we can make no such inference from the fact that there is room to write more. This fact shows carelessness; but it was not the carelessness of the indorser, but the forgery of the maker, that was the proximate cause that misled the holder. And we know not how we can say that a man be chargeable with a contract because he did not use proper precaution in guarding against forgery

[1] See Holmes *v.* Trumper, post, pp. 258, 265.

in any of the thousand forms it may take. We know of no way of saving purchasers of negotiable paper from the necessity and the consequences of relying on the character of the man they buy it from, if they do not take the trouble of inquiring of the original parties.

But this plaintiff had no hand in the alteration, and, as this is a case stated, we are not met by any discrepancy of allegata and probata, and therefore we can give judgment for the true amount of the note.[1] Ross on Bills and Notes, 201. This brings the case within the Hundred Dollar Act, and therefore the judgment must be without costs.

Judgment for plaintiff for $60.37½.

HOLMES *v.* TRUMPER.

Supreme Court of Michigan, April, 1871. 22 Mich. 427.

To alter a promissory note materially, after delivery of it, by adding words in a blank left at the end, which closes with the words 'with interest at,' avoids the note even in the hands of a bona fide holder for value.

The facts are sufficiently stated in the opinion.

CHRISTIANCY, J., for the court. — This was an action brought by Holmes against Trumper upon a promissory note signed by the latter, which note was partly printed and partly in writing, a printed blank having been used. The following is a copy of the body of the note as it appeared upon the trial, the portions in italics being printed and the other portions written, viz.: —

'$400.

'One year *after date* I *promise to pay to Lyman Terry or bearer*, four hundred *dollars, at* the First National Bank of Ann Arbor, *value received, with interest at* 10 per cent. [signed] JACOB TRUMPER.'

[1] See Bills of Exchange Act, 64, (1); Bills and Notes (Students' Series), 187, note.

There was evidence on the part of the defendant tending to show that the note had been altered after it was made and delivered to the payee by adding, after the printed word 'at,' in the last line, the figures and words '10 per cent,' and (as is to be fairly inferred from the whole record and the argument, though not expressly stated), that this alteration was made without the knowledge or consent of the maker.

It was conceded on the trial that the plaintiff was a bona fide holder of the note before due, and the only question in the case is whether the wrongful alteration of the note by the payee or any subsequent holder (for such was the only inference, there being no evidence showing by whom the alteration was made) rendered the note void in the hands of the plaintiff, or constituted a defence as against him in favor of the maker.

Without extrinsic evidence of authority to make the alteration, it is too clear to require the citation of authorities, that unless the note, *as signed*, can be treated as a note given in blank, so far as relates to the rate of interest, giving the payee or holder the right to fill the blank by inserting the rate, the alteration must be treated as a forgery, since it is one which, if valid, would enlarge the liability of the maker.

We are entirely satisfied that this note when signed without the addition of the words '10 per cent' was, notwithstanding the word 'at,' in legal effect, a complete and valid note, drawing the legal rate of interest at seven per cent; and that the word 'at,' at the end of the printed form, might readily be overlooked by the signer, or disregarded as of no consequence if noticed at all; and that there was, therefore, no such blank left in it as would warrant the payee or holder, without further evidence of assent, to insert a different rate of interest. See Warrington *v.* Early, 2 Ellis & Blackb. 763; Waterman *v.* Vose, 43 Maine, 504.

The case which may be regarded as coming nearest to supporting the implied authority to insert the special rate

in this case, is that of Visher *v.* Webster, 8 Cal. 109. But whatever may be the authority of that case and that of Fisher *v.* Dennis, 6 Cal. 577, upon which it is based, we do not think it would authorize the alteration in the present case.

The note in that case, as signed, was in the following form: —

'One day after date, we jointly and severally promise to pay Messrs. A. N. Fisher & Co., or order, the sum of seven hundred and eight 71–100 dollars, for value received, with interest, monthly, at the rate of —— per cent per annum, per month, until final payment.'

The alteration consisted in filling this blank with the word 'five.' Such a blank in the body of the note would clearly indicate to any one that it was intended to be filled, and the fact that it was payable monthly could not well be overlooked. But in the case before us the insertion of the words '10 per cent,' at the end of the note after the single printed word 'at,' can hardly be called the filling a blank at all; and though it is urged that leaving the printed word 'at' at the close of the note was calculated to facilitate the forgery, by inducing in other parties the belief of the genuineness of the words added, yet it may be said with at least equal force, on the other hand, that to those looking at the note after the alteration critically enough to notice the printed word 'at,' the printed form of the note itself might well excite suspicion that the form was specially got up by the payee to render the forgery more easy, and that the words '10 per cent,' added at the end, were rather calculated to increase than to allay the suspicion of their genuineness; since, if the note was got up and printed only with the intention of leaving a blank for the insertion of the rate, the words, 'per cent,' might just as well, and much more naturally would have been, printed after a small blank following the word 'at.' Even the name of the payee was printed in the note. Would the payee, in honestly getting up such a note, have it printed without printing also the words 'per cent,' which would

in all cases be the same, whatever the rate? These considerations are not conclusive, it is true, but they are not without weight.

We think the courts have gone quite far enough in sustaining instruments executed in blank, and the implied authority to fill them up, and we are not disposed to take a step in advance in that direction.

The counsel for the plaintiff in error fully admits the general rule, that an alteration having this effect thus to increase the maker's liability, renders the note void as against the maker, even in the hands of a bona fide holder for value. But he insists that, though it may be a forgery, the peculiar facts of this case bring it within a principle which constitutes an exception to the general rule; that the maker was guilty of negligence in leaving a blank apparently intended for the insertion of the rate per cent unfilled, and without drawing a line through the blank or erasing the word 'at,' to indicate that it was not to be filled, and that he thereby invited and facilitated the forgery in a manner calculated to impose upon innocent parties, and that he must therefore, as between him and such innocent parties, be held to pay the note, in its altered form, in the same manner as if it had been originally so drawn, on the principle that, 'where one of two innocent parties must suffer by the fault of a third, he shall sustain the loss who put it in the power of the third to occasion it;' or, as expressed by the Louisiana court, in Isnard *v.* Torres *et al.*, 10 La. An. 103: 'Where one of two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who, by his own act, has occasioned the confidence and consequent injury of the other.'

This principle is one of quite general application, and where properly understood and limited, it is one of manifest equity; but it has many limitations and qualifications. Whether the present case falls within it or constitutes an exception is a question of some nicety, requiring considerable accuracy of discrimination for its solution, and upon which unanimity of decision could perhaps hardly be

expected; and we accordingly find that able courts have arrived at opposite conclusions upon it. But, upon principle and the weight of authority, we think the liability of the maker upon the note, as altered, cannot be maintained. The general principle that 'where one of two innocent parties must suffer,' etc., upon which the plaintiff in error relies, as stated by us in Burson *v.* Huntington,[1] decided at the last October term, is one which, in its application, is mainly confined to cases where the third person, whose act or default has occasioned the loss, has been, in some sense or to some extent, the agent of the party who is made to sustain the loss, or when the latter, by his acts or negligence, has authorized the other party to consider him as such; and in all the cases (unless this is an exception) where, upon the general principle relied upon, a party has been held liable upon a written contract on the ground of negligence alone, without reference to such agency, he has only been held liable upon it in the shape in which he allowed it to go from his hands, and not as criminally altered by another. Thus, if an acceptor of a bill pay and take it up, and then, without cancellation or any mark to denote its payment, throws it into the street, and it gets into the hands of a bona fide holder before apparently dishonored or overdue, the acceptor will be liable upon it. See Ingham *v.* Primrose, 7 C. B. N. S. 82; Foster *v.* Mackinnon, Law Rep. 4 C. P. 704.[2] But even such a case does not wholly, perhaps, exclude the idea of agency; since a party thus throwing his acceptance into the streets, may be said, as between him and the innocent holder, to have authorized any one who might pick it up to negotiate it.

As between the maker of commercial paper and an innocent party acting upon the faith of the paper, which the maker has voluntarily and intentionally executed and even negligently allowed to go out of his hands and to get into circulation, the general principle we are discussing would preclude such maker from showing that the paper

[1] Ante, p. 227. [2] Ante, p. 237.

was not intended to have the effect which its appearance indicated, though, as between the original parties, many things might be shown to defeat it. It is substantially a representation upon which he has authorized innocent parties to act; and when they have thus acted he must be held by the contract indicated by the representation thus made.

But this reasoning extends only to the paper as made and issued by him, or as he has thereby authorized some other person to change its terms; and the note in this case being a complete legal instrument when issued, to hold him bound by the contract, as altered by the forgery, involves the idea that the person committing the forgery was his agent in committing it (a ludicrous absurdity), or at least that he had authorized innocent third parties so to treat him.

Upon the hypothesis of the plaintiff in error which we are now considering, it is not claimed, nor in view of the facts as disclosed by the record can it be claimed, that the person making the alteration had any authority, nor that the maker had done or omitted anything to induce the belief, that he had authorized any subsequent holder to make it, nor that it was made by any person standing in any confidential relation to or held out as such by him. The whole argument goes upon the assumption that the plaintiff took the note in ignorance that any alteration had been made. The argument amounts simply to this: That by the maker's awkwardness or negligence his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word 'at,' and to draw a line through the blank which followed it; and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way.

But how such a crime, whether committed in this or in any other way, could create a contract on the part of the maker we confess ourselves unable to comprehend; nor are

we satisfied that a forgery committed in this way would be any less liable to detection than if committed in many other ways. The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument; or, as if an instrument were written with ink, the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper, or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word. The law has no scale by which to measure the various degrees of facility with which different modes of forgery may be committed, or their liability to suspicion or detection; and we see no clear and intelligible distinction by which we could hold the maker in this case bound by this forgery, which would not hold all persons liable for the alteration and forgery of any paper signed by them. Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders.

If promissory notes were only given by first-class business men who are skilful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which

the argument in behalf of the plaintiff in error would require. But for the great mass of the people who are not thus skilful, nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men, of even fair education and competency for business, at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper.

We have thus far considered the question involved as one of principle alone; and, though the authorities are not uniform, there is, we think, a very decided preponderance in favor of the conclusion at which we have arrived.

Of English authority, there is little if any opposed to the view we have taken. It is sufficient to say of the cases of Payne *v.* Wylie and Graham *v.* Gillespie, cited in Ross on Bills and Notes, p. 194 and 195, that but one of them has any bearing upon the question, as it relates to a promissory note, and that nisi prius cases and others which have not been considered of sufficient weight to secure a place in the regular and authorized reports can be of little value as mere authority.

But the English case upon which the plaintiff in error mainly relies is that of Young *v.* Grote *et al.*, 4 Bing. 253. At a hasty glance, this case might seem to support the rule for which it is cited; but a careful examination will show that it has very little bearing upon the precise question involved in the present case. That was the case of a cheque drawn by a customer upon his bankers. The plaintiff, Young, having occasion to be absent, left with his wife certain printed cheques upon the bankers, signed by him in blank, to be filled up by her and drawn as his business might require. She delivered one of these cheques, so signed, to the *plaintiff's clerk* to be filled up by him with the sum of fifty pounds (and some shillings and pence). The clerk filled out the cheque, beginning the word 'fifty' with a small letter, and in the middle of the blank line left for the sum, and showed it to the plaintiff's wife, who directed him to draw the cash. Before present-

ing it to the bankers, this clerk altered the cheque by inserting before the word 'fifty' the words, 'three hundred and,' thus making it a cheque of three hundred and fifty instead of fifty pounds, all in the same handwriting, and then himself presented the cheque to the bankers, and drew the whole larger sum. The action against the bankers was not, of course, brought by Young upon the cheque, but for the money which he claimed had been paid out by the bankers without authority. Under the circumstances stated, the court held the plaintiff was not entitled to recover.

Now, there are several features or elements in this case which distinguish it from the present, and upon which it is quite possible that case may be supported as law without giving any support to the present action.

It was a cheque by a customer upon his bankers, who, as depositaries of their customers' money, were *bound*, from time to time, to pay such sums as the latter might order. They were under obligation to pay his cheques so long as his money was in their hands to meet them. This circumstance is made prominent in the opinion of Parke, J. Now, it is quite clear that no person is under any obligation to purchase a promissory note, nor, consequently, to decide whether the paper is genuine or not.

Another very important circumstance in that case was that the cheque was filled up by the plaintiff's clerk, the alteration made, and the money drawn by him in person, and the plaintiff, by *employing him* as he did, as his clerk, and (through his wife), as his agent to fill the cheque, and in person to draw the money from the bankers, might well be held to have placed a confidence in him for which he should be responsible, or at least to have authorized the bankers to place confidence in him. These circumstances are specially relied upon by Best, C. J., as distinguishing the case from that of Hall *v.* Fuller, 5 B. & C. 750, which was decided directly the other way.

There is, however, one American case (Isnard *v.* Torres, 10 La. An. 103), which in its facts, reasoning, and conclu-

sion does, as to a promissory note, fully sustain the doctrine contended for the plaintiff in error.

On the other hand, Worrall *v.* Gheen, 39 Penn. St. 388,[1] is a well considered case, similar in all its facts to the Louisiana case, and involving the same principles, in which the Supreme Court of Pennsylvania reach the opposite conclusion, the same at which we have arrived. See also, as supporting this view, Goodman *v.* Eastman, 4 N. H. 455, and Bruce *et al. v.* Westcott, 3 Barb. 374.

We see no ground upon which the defendant below could be held to pay the amount of the note, as originally drawn, at least when the action is brought upon the note itself, without departing from the whole theory upon which, at common law, the defence rests, which is that the paper, by the alteration or forgery, is rendered void, and does not constitute a contract in any respect.

There was no error in the ruling of the Circuit Court, and the judgment must be affirmed with costs.

The other justices concurred.

PRICE *v.* NEAL.

King's Bench of England, Michaelmas, 1762. 3 Burr. 1354.

The drawee of a bill of exchange having paid the same to a bona fide holder for value, cannot recover back the money as paid by mistake, on discovering that the drawer's signature was not genuine.

This was a special case reserved at sittings before Lord Mansfield. It was an action upon the case brought by Price against Neal, wherein Price declares that the defendant Neal was indebted to him in £80 for money had and received to his the plaintiff's use; and damages were laid at £100. The general issue was pleaded, and issue joined thereon.

It was proved at the trial that a bill was drawn as follows: 'Leicester, 22 November, 1760. Sir, six weeks

[1] Ante, p. 256.

after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London.' Indorsed, 'R. Ruding, Antony Topham, Hammond & Laroche. Received the contents, James Watson & Son: Witness Edward Neal;'

That this bill was indorsed to the defendant for a valuable consideration, and notice of the bill left at the plaintiff's house on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of £40 and take up the said bill, which was done accordingly;

That another bill was drawn as follows: 'Leicester, 1st February, 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor, as advised by, Sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London;' that this bill was indorsed, 'R. Ruding, Thomas Watson & Son. Witness for Smith, Right & Co.;' that the plaintiff accepted this bill by writing on it, 'accepted, John Price;' and that the plaintiff wrote on the back of it, 'Messieurs Freame & Barclay, pray pay forty pounds for John Price;'

That this bill, being so accepted, was indorsed to the defendant for a valuable consideration, and left at his bankers for payment, and was paid by order of the plaintiff and taken up.

Both these bills were forged by one Lee, who has been since hanged for forgery. The defendant Neal acted innocently and bona fide, without the least privity or suspicion of the said forgeries or of either of them, and paid the whole value of those bills.

The jury found a verdict for the plaintiff, and assessed damages £80 and costs 40*s.*, subject to the opinion of the court upon this question: 'Whether the plaintiff, under the circumstances of this case, can recover back from defendant the money he paid on said bills or either of them.'

LORD MANSFIELD stopped Mr. Yates for the defendant, saying that this was one of those cases that could never be made plainer by argument.

It is an action upon the case, for money had and received to the plaintiff's use; in which action the plaintiff cannot recover the money unless it be against conscience in the defendant to retain it, and great liberality is always allowed in this sort of action. But it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had bona fide paid without the least privity or suspicion of any forgery.

Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill he actually accepts, after which acceptance the defendant innocently and bona fide discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then finds out that they were forged; and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value, bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff and not in the defendant.

Per cur. Rule — That the postea be delivered to the defendant.

McKLEROY *v.* SOUTHERN BANK OF KENTUCKY.

Supreme Court of Louisiana, May, 1859. 14 La. An. 458.

The acceptor of a bill of exchange is not estopped to show that the signature of the drawer is not genuine, against a holder, though for value in good faith, who purchased the bill before it was accepted or known by the drawee to exist.

The case is cited in the opinion.

LAND, J., for the court. — The evidence in this case establishes the following facts, viz.:

The plaintiffs were the factors of James Smith, a cotton planter, residing in the State of Arkansas. One John Zimmer, who had for a few months been a private tutor in Smith's family, assuming the name of John Belmont, forged a draft on the plaintiffs, in the name of Smith, as follows:

'HOMESTEAD, November 5, 1857.

'$986.

'On the 15th December, 1857, pay to the order of John Belmont nine hundred and eighty-six dollars, value received, and charge the same to the account of

JAS. SMITH.

To Messrs. McKleroy & Bradford, New Orleans, La.'

Zimmer also forged a letter of introduction, in the name of Smith, to Shotwell & Son of Louisville, Kentucky, as follows:

'HOMESTEAD, November 5, 1857.

'MESSRS. SHOTWELL & SON.

'Gentlemen:

'I introduce to you Mr. John Belmont, a gentleman who has resided in my family as our tutor. Having been sick, he is now travelling to improve his health. I gave him a draft on McKleroy & Bradford, my commission house in New Orleans, which he is desirous to get cashed in your city. If you can give Mr. Belmont any assistance, by

perhaps recommending my draft, as Mr. Belmont is a stranger in your city, and not yet fully recovered, you will greatly oblige me.

I am, gentlemen, yours respectfully,

JAMES SMITH.'

The house of Shotwell & Son had been in correspondence with James Smith for about twelve years; and being deceived by the forger indorsed the draft for the purpose of enabling the holder to negotiate it. The draft bearing the indorsements of John Belmont and of Shotwell & Son was presented for discount at the Branch of the Southern Bank of Kentucky, and being considered good was purchased by the bank. The draft was remitted to the Louisiana State Bank, with the following additional indorsement upon it: 'Pay to R. J. Palfrey, cashier, J. B. Alexander, cashier.' The draft thus indorsed was presented to plaintiffs for acceptance by the Louisiana State Bank, and was accepted on the last of November, or first of December, and was paid at maturity, on the eighteenth of December, 1857, by the plaintiffs to the agent of the Southern Bank of Kentucky. In January, 1858, James Smith, being in the city, made known to the plaintiffs, upon an examination of his account with them, that the draft was a forgery. Mr. Shotwell, of the house of Shotwell & Son, was in this city at the time, and was immediately sent for, and the fact of forgery communicated to him. On the 4th of January, 1858, the plaintiffs gave formal notice by letter of the forgery to A. L. Shotwell & Son, to the Southern Bank of Kentucky, and also the Louisiana State Bank.

This suit was instituted by the plaintiffs to recover back the money paid on the draft, on the ground of payment in error. There was judgment for the defendant, and the plaintiffs have appealed.

The district judge held that the acceptance of a bill of exchange admits the genuineness of the drawer's signa-

ture, and that where an acceptor has paid to a bona fide holder of a forged draft or bill, having no notice of the forgery, he cannot recover back the money paid, although the forgery is established by the most conclusive evidence. And where one of two innocent persons must suffer, he who has misled the other, or has omitted his duty, must bear the loss.

These principles of law are well established, and admit perhaps of neither doubt nor controversy, and if applicable to this case must determine the rights of the parties.

The defendant became the holder of the draft *before it was accepted by the plaintiffs, and before they had any knowledge of its existence,* and consequently before the defendant had any right of action against them for its recovery. The plaintiffs therefore had done no act which induced the defendant to believe the signature of the drawer to be genuine, at the time the bill was purchased. How then can it be said that the defendant purchased the bill on the faith of the plaintiffs' acceptance, or on their guaranty[1] of the genuineness of the drawer's signature? Or how can it be said that the plaintiffs misled the defendant at the time of the purchase of the bill, or was then guilty of the omission of any duty toward the defendant as purchaser of the bill?

If the defendant had purchased the bill on the faith of the acceptance of plaintiffs, or had sustained any loss in consequence of their negligence, we would have no difficulty in affirming the judgment of the lower court; but such are not the facts made known to us by the record. The defendant purchased the bill on the faith of the indorsement of Shotwell & Son, which was a warranty of the genuineness of the drawer's signature[1] to the bank; and there is no good reason why the accidental payment made by the plaintiffs should inure to the benefit of the defendant.

Mr. Chitty says on this subject: 'If he [the holder]

[1] See Bills and Notes (Students' Series), 76, 78.

thought fit to rely on the bare representation[1] of the party from whom he took it, there is no reason that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when by an immediate notice of the forgery he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and consequently the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems that of late, upon questions of this nature, these latter considerations have influenced the court in determining whether or not the money shall be recoverable back; and it will be found, on examining the older cases, that there were facts affording a distinction, and that, upon attempting to reconcile them, they are not so contradictory as might on first view have been supposed.' Chitty on Bills, 464.[2]

The facts in this case afford the distinction to which Mr. Chitty refers, and take the case out of the general rule which prevents the acceptor of a bill of exchange from recovering back the money paid in cases of forgery of the drawer's signature. The loss had *already* attached before the bill was either accepted or paid, and the acceptors gave immediate notice to the defendant, and Shotwell & Son, after ascertaining for the first time, from James Smith, in whose name the bill was drawn, the fact of forgery.

The evidence shows that plaintiffs accepted the bill, in the language of the witness, 'chiefly through the respectability of the channels through which it came.' It is therefore difficult to conceive upon what principle of equity or right the defendant can be permitted to retain the money paid in error by the plaintiffs, upon the facts of this case. No authority applicable to the particular circumstances of this case has been cited by the defendant's

[1] See Bills and Notes (Students' Series), 76, 78.

[2] 431, 12th Am. ed.

counsel, and we have no hesitation in reversing the judgment upon the authority of Mr. Chitty, above quoted.

In a case like the present the acceptor is not estopped from proving the forgery.

Judgment for the plaintiffs.

HORTSMAN *v.* HENSHAW.

Supreme Court of United States, December, 1850. 11 How. 177.

The acceptor of a bill of exchange cannot recover the amount thereof paid to a bona fide holder, if the drawer put the bill into circulation bearing a forged indorsement of the payee's name.

The case is stated in the opinion of the court.

Taney, C. J., for the court. — The material facts in this case may be stated in a few words. Fiske & Bradford, a mercantile firm in Boston, drew their bill of exchange upon Hortsman of London, payable at sixty days' sight to the order of Fiske & Bridge, for six hundred and forty-two pounds sterling. The drawers, or one of them, placed the bill in the hands of a broker, with the names of the payees indorsed upon it, to be negotiated; and it was sold to the defendants in error bona fide and for full value. They transmitted it to their correspondent in London, and upon presentation it was accepted by the drawee, and duly paid at maturity. The payees and indorsees all resided in Boston, where the bill was drawn and negotiated.

It turned out that the indorsement of the payees was forged, — by whom does not appear; and a few months after the bill was paid, the drawers failed and became insolvent. The drawee, having discovered the forgery, brought this action against the defendants in error to recover back the money he had paid them.

The precise question which this case presents does not appear to have arisen in the English courts; nor in any of the courts of this country with the exception of a single

case, to which we shall hereafter more particularly refer. But the established principles of commercial law in relation to bills of exchange leave no difficulty in deciding the question.

The general rule undoubtedly is, that the drawee by accepting the bill admits the handwriting of the drawer but not of the indorsers; and the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it.

The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder therefore has no right to demand the money. If the bill is dishonored by the drawee, the drawer is not responsible. And if the drawee pays it to a person not authorized to receive the money, he cannot claim credit for it in his account with the drawer.

But in this case the bill was put in circulation by the drawers, with the names of the payees indorsed upon it. And by doing so they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. And if the drawee had dishonored the bill, the indorser would undoubtedly have been entitled to recover from the drawer. The drawers must be equally liable to the acceptor who paid the bill. For having admitted the handwriting of the payees, and precluded themselves from disputing it, the bill was paid by the acceptor to the persons authorized to receive the money, according to the drawer's own order.

Now, the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by

his acceptance from averring the contrary in a suit brought against him by the holder. The rights of the parties are therefore to be determined as if this bill was paid by Hortsman out of the money of Fiske & Bradford in his hands. And as Fiske & Bradford were liable to the defendants in error, they are entitled to retain the money they have thus received.

We take the rule to be this: Whenever the drawer is liable to the holder, the acceptor is entitled to a credit if he pays the money; and he is bound to pay upon his acceptance, when the payment will entitle him to a credit in his account with the drawer. And if he accepts without funds, upon the credit of the drawer, he must look to him for indemnity, and cannot upon that ground defend himself against a bona fide indorsee. The insolvency of the drawer can make no difference in the rights and legal liabilities of the parties.

The English cases most analogous to this are those in which the names of the drawers or payees were fictitious, and the indorsement written by the maker of the bill. And in such cases it has been held that the acceptor is liable, although, as the payees were fictitious persons, their handwriting of course could not be proved by the holder. 10 Barn. & Cres. 478. The American case to which we referred is that of Meacher *v.* Fort, 3 Hill (S. C.)., 227. The same question now before the court arose in that case, and was decided in conformity with this opinion.

Another question was raised in the argument upon the sufficiency of the notice; and it was insisted by the counsel for the defendants, that, if they could have been made liable to this action by the plaintiff, they have been discharged by his laches in ascertaining the forgery and giving them notice of it.

But it is not necessary to examine this question, as the point already decided decides the case.

The judgment of the Circuit Court is

Affirmed with costs.

MORRIS v. BETHELL.

Court of Common Pleas of England, Michaelmas, 1869.
L. R. 5 C. P. 47.

The fact that a person pays one bill of exchange bearing an acceptance purporting to be his, will not, as matter of law, estop him from saying that a like acceptance of a later bill is not his acceptance.

Action against the acceptor of a bill of exchange for £400, dated 22d of July, 1868, drawn by Richard Bethell, payable three months after date, and indorsed by Bethell to the plaintiff. Plea, denial of the alleged acceptance. Issue thereon.

The facts were as follows: In May, 1867, the plaintiff discounted for Richard Bethell a bill for £300, purporting to be drawn by Richard Bethell upon the defendant and to be accepted by the latter, payable at his bankers, Coutts & Co.; which bill was at its maturity, viz., on the 5th of August, 1867, paid by Messrs. Coutts & Co., by authority of the defendant. Upon the faith of the former bill having been duly honored by the defendant, the plaintiff also discounted for Richard Bethell the bill declared on. The defendant had in June and July, 1867, before maturity, paid two other bills similarly drawn, and purporting to be accepted by him. The defendant, who was called as a witness, swore that all these acceptances were forgeries, that the acceptances were unauthorized by him, and that he did not know that the plaintiff was the holder of the bill for £300 which was paid in August, 1867. He further stated that he had paid the former bills in order to avert from his brother the consequences of his act, and upon his solemn promise that it should not be repeated. It did not appear that the plaintiff was aware of the payment of the two bills in June and July, 1867, or that he made any inquiry before he took the bill in question.

On the part of the plaintiff it was contended that the defendant having paid the bill which the plaintiff held in

August, 1867, admitted[1] thereby that the acceptance was genuine, and, in the absence of notice to the plaintiff, was estopped from denying that the bill declared on was accepted by him or with his authority.

The Lord Chief Justice, though pressed by the Solicitor General,[2] on behalf of the defendant, to do so, refused to nonsuit the plaintiff; and the jury, in answer to questions left to them, found that the acceptance to the bill declared on was not the defendant's signature, nor authorized nor adopted by him; that he did not know that the plaintiff had held the former bill of August, 1867; and that he did not lead the plaintiff to believe that the acceptance to the bill in question was his signature, or was authorized by him.

A verdict was thereupon entered for the defendant; leave being reserved to the plaintiff to move to enter a verdict for him for the amount of the bill and interest, if the court should be of opinion that the Lord Chief Justice was bound to hold, as matter of law, that upon the foregoing facts the plaintiff was entitled to a verdict.

Bovill, C. J. — At the trial the plaintiff's counsel contended that the defendant was estopped from denying that the acceptance to the bill declared on was his, the Solicitor General, on the other hand, contending that I ought to nonsuit the plaintiff. I declined to withdraw the case from the jury, because I thought there was evidence for them, though extremely slight. I now entertain some doubt whether I ought to have left the case to the jury at all. They, however, found that the acceptance in question was not the defendant's signature, nor affixed to the bill with his authority, and that the false signature was not adopted by the defendant; and they further found that the defendant did not know that the plaintiff was the holder of the £300 bill paid in August, 1867. With reference to the

[1] Compare Bills and Notes (Students' Series), 76, 78.

[2] Sir John Duke Coleridge.

alleged holding out, the jury also found that the defendant did not lead the plaintiff to believe that the acceptance was his signature. If then the question was for the jury, it has been decided against the plaintiff.

Mr. Huddleston now insists that I was bound to rule, as matter of law, that upon the facts proved the plaintiff was entitled to the verdict; and that is the question which by consent was reserved by me for the court. I am of opinion that the finding of the jury disposes of the case. The only ground upon which a man can be held responsible as the acceptor of a bill signed by another in his name is, that he has authorized or adopted the signature, or has so conducted himself as to be estopped from disputing it. Now, what had the defendant done here? He had on a former occasion paid a bill of which the plaintiff was the holder, which had been similarly accepted in his name without his authority; and it is contended that he thereby held out to the plaintiff that he would treat as genuine and pay all bills so accepted. There was no evidence that the defendant ever knew that the plaintiff was the holder of the former bill; and the plaintiff seems to have made no inquiry when he discounted the bill in question. If it were made to appear that there has been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of his principal, there would be evidence, and almost conclusive evidence, against the latter that the acceptance was written by his authority. That was the case of Barber *v.* Gingell, 3 Esp. 60. It would have been idle to contend there that the defendant was not responsible for the signature. The report is short; but I do not understand it to have been treated as matter of law, but rather as a conclusion of fact by the jury. Here the transaction was not one of a mercantile character; there was no business between the parties.

What then does the payment of one bill under such circumstances hold out? Is it that, as matter of law, the

party binds himself to pay all further bills which may assume to bear his acceptance, whether authorized by him or not? I should be sorry to affirm any such principle; and I think no jury could safely act upon the notion of authority or adoption under such circumstances. The utmost extent of the doctrine, as it seems to me, is that it is a question for the jury. Indeed, in all the cases cited by Mr. Huddleston the question was left to the jury.[1] If the defendant had by his conduct led the plaintiff to suppose that the acceptance was his genuine signature, or was authorized by him, he might be estopped from disputing it; otherwise not. But that was especially a question for the jury. It was put to the jury, and they negatived it, and, as I think, properly negatived it. At all events there was no evidence upon which the judge would have been warranted in acting upon his own responsibility and holding that, as matter of law, the plaintiff was entitled to a verdict. The rule must therefore be refused.

WILLES, J. — I am of the same opinion. The utmost extent to which we could go in Mr. Huddleston's favor would be to affirm that of which he had the full benefit at the trial. The matter was left to the jury; and they have decided against the plaintiff. One who pays one bill which purports to bear his signature as acceptor thereby makes evidence against himself that the person who wrote the acceptance did so with his authority; and if the bill is given in a course of business implying the continuance of such authority, it may be conclusive evidence. That is the fullest extent to which it is possible, consistently with law, to affirm the propositions; and that is disposed of by the findings of the jury in this case. What we are now asked to say is, that although authority to accept and any

[1] The following cases, and some others, were cited: Barber *v.* Gingell, supra; Keane *v.* Rogers, 9 Barn. & C. 577, 586; Graves *v.* Key, 3 Barn. & Ad. 313; Pickard *v.* Sears, 6 Ad. & E. 469; Gregg *v.* Wells, 10 Ad. & E. 90; Freeman *v.* Cooke, 2 Ex. 654; Ryan *v.* Sams, 12 Q. B. 460; Cornish *v.* Abington, 4 Hurl. & N. 549. See Bigelow, Estoppel, 5th ed. pp. 558, 559.

adoption or ratification of the acceptance be negatived, and although there has been no course of business, and nothing to show any continuance of authority, or representation of continued authority, to accept bills in his name, the payment by the defendant of one bill which purports to bear his acceptance affords not merely evidence but a presumptio juris et de jure which cannot be contradicted, that all subsequent bills bearing the same sort of acceptance are authorized by him. That proposition is neither sanctioned by law nor is it in accordance with common sense. In the absence of proof of any authority or adoption or course of business, the payment of the bill in August, 1867, was only evidence of an admission by the defendant that that bill was accepted by him or by some one acting under or authorized by him; not of a general authority in that person to accept bills in his name. The doctrine of estoppel has no application to such a case. It is unnecessary to say anything as to the payment of the other bills, to which the plaintiff was no party. That was left to the jury. I entirely agree with my lord that there should be no rule.

KEATING, J. — I am of the same opinion. No doubt a man who pays one or more forged acceptances does furnish some evidence against himself that the acceptance was authorized by him; and it might perhaps be said that the payment by the defendant to the plaintiff of the bill which became due in August, 1867, was evidence to go to the jury that he authorized that particular acceptance. I therefore think my lord was right in leaving the matter to the jury. That, however, does not suit the plaintiff's purpose, because the whole of the facts were left to the jury, and they have found against him. He now seeks to contend that, as matter of law, having paid one forged acceptance in the hands of the plaintiff, the defendant binds himself forever unless he gives notice, and cannot be heard to say that he did not authorize the acceptance of a

counsel, and we have no hesitation in reversing the judgment upon the authority of Mr. Chitty, above quoted.

In a case like the present the acceptor is not estopped from proving the forgery.

Judgment for the plaintiffs.

HORTSMAN *v.* HENSHAW.

Supreme Court of United States, December, 1850. 11 How. 177.

The acceptor of a bill of exchange cannot recover the amount thereof paid to a bona fide holder, if the drawer put the bill into circulation bearing a forged indorsement of the payee's name.

The case is stated in the opinion of the court.

TANEY, C. J., for the court. — The material facts in this case may be stated in a few words. Fiske & Bradford, a mercantile firm in Boston, drew their bill of exchange upon Hortsman of London, payable at sixty days' sight to the order of Fiske & Bridge, for six hundred and forty-two pounds sterling. The drawers, or one of them, placed the bill in the hands of a broker, with the names of the payees indorsed upon it, to be negotiated; and it was sold to the defendants in error bona fide and for full value. They transmitted it to their correspondent in London, and upon presentation it was accepted by the drawee, and duly paid at maturity. The payees and indorsees all resided in Boston, where the bill was drawn and negotiated.

It turned out that the indorsement of the payees was forged, — by whom does not appear; and a few months after the bill was paid, the drawers failed and became insolvent. The drawee, having discovered the forgery, brought this action against the defendants in error to recover back the money he had paid them.

The precise question which this case presents does not appear to have arisen in the English courts; nor in any of the courts of this country with the exception of a single

case, to which we shall hereafter more particularly refer. But the established principles of commercial law in relation to bills of exchange leave no difficulty in deciding the question.

The general rule undoubtedly is, that the drawee by accepting the bill admits the handwriting of the drawer but not of the indorsers; and the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it.

The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder therefore has no right to demand the money. If the bill is dishonored by the drawee, the drawer is not responsible. And if the drawee pays it to a person not authorized to receive the money, he cannot claim credit for it in his account with the drawer.

But in this case the bill was put in circulation by the drawers, with the names of the payees indorsed upon it. And by doing so they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. And if the drawee had dishonored the bill, the indorser would undoubtedly have been entitled to recover from the drawer. The drawers must be equally liable to the acceptor who paid the bill. For having admitted the handwriting of the payees, and precluded themselves from disputing it, the bill was paid by the acceptor to the persons authorized to receive the money, according to the drawer's own order.

Now, the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by

counsel, and we have no hesitation in reversing the judgment upon the authority of Mr. Chitty, above quoted.

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Now, the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by

memorandum of association, after stating the object of the company to be the formation of a 'société anonyme' in Peru for the construction of railways there, continues in these words: 'In order to the attainment of the main object of the company they may do, either in the United Kingdom, or Peru, or elsewhere, whatsoever they from time to time think incidental or conducive thereto.' Anything therefore which, in the opinion of the company . . . is incidental or conducive to the main object of the company, which was the acquisition of concessions for railways, they may do. If, therefore, there comes to be a concession for a railway which is to be paid for by instalments, it is, I think, beyond all possibility of dispute that, if they think it incidental or conducive to the attainment of the concession, when the instalments become or are about to fall due, in place of making calls on their shareholders they should give a bill of exchange, payable at a future day, for the amount of the instalments, they may do so. The words seem to me to be so wide that they necessarily include a power of that kind. . . .

BAYLEY *v.* TABER.

Supreme Court of Massachusetts, May, 1809. 5 Mass. 286.

Commercial paper declared void by statute is void even in the hands of a bona fide holder for value.

The declaration in this action contained thirty-seven counts upon as many promissory notes, alleged to have been made by the defendants, each under five dollars, payable to bearer on demand for value received, and bearing date between the third day of October and the thirtieth day of December, 1804. Plea, the general issue.

At the trial, notes comporting with the several counts were produced in evidence, all bearing the impression of plates, types, or printing. The signature of the defend-

ants to all of them was admitted. The defendants offered to prove that some of the notes declared on were in fact made and issued by them after the first day of April, 1805, though bearing date before that day; and that the notes which had been so made were antedated by them, to avoid the operation of the Statute of 1804, c. 58, which declares notes of the like description, made or issued after that day, to be utterly void.

PARKER, J., for the court. — This cause was tried before me at the sittings after the last law term in Cumberland, in May last; and I then inclined to the opinion that the defendants should not be permitted to allege a falsity in an instrument made and signed by themselves, and which had by them been put into general circulation as money. Notes of this description, under the denomination of Taber's notes, to a large amount, having become a common currency in the district of Maine, it suddenly struck me as inconsistent with the common principles of justice, and the policy of the law, that the promisors in those notes should be allowed to avoid payment of them to an innocent holder, by alleging that they bore false dates, and by showing that in uttering them they had contravened the laws of the Commonwealth.

I therefore rejected the evidence offered; but very soon after the trial, having revolved the question in my mind at more leisure, I came to doubt of the correctness of my opinion, and intimated my desire to the counsel that the question should be reserved for the consideration of the whole court. This was done in such manner as to cause very little delay, and no inconvenience to the parties or their counsel; it having been agreed that the question should be taken up by the court at this adjourned session, and that the arguments of the counsel should be reduced to writing, and transmitted to the court.

Upon an attentive consideration of the question, and of the arguments sent to us, which on both sides are concise

and perspicuous, we are unanimously and clearly of opinion that the facts proposed by the defendants to be proved to the jury at the trial, constitute a good defence against the counts to which those facts are applicable, and that it is competent to the defendants in this action to set up and maintain such defence.

The Statute of 1804, c. 58, § 1, enacts that all bills, notes, cheques, drafts, or obligations whatsoever, under the amount of five dollars, payable to bearer or to order, shall be wholly in writing; and that all notes, etc., under the aforesaid amount, and payable as aforesaid, which should be made or issued after the first day of April then next, and which should bear the impression of types, plates, or printing, should be utterly void, and that no action should be thereon sustained in any court of law.

The second section of the same statute imposes a penalty upon any person who should issue or pass any of the securities described in the first section, after the said first day of April, which was April, 1805.

The same statute, c. 134, imposed an increased penalty upon any person who should, after the tenth day of the same April, issue or pass like notes, other than those of incorporated banks, for a less sum than five dollars or whereon less than five dollars should be due, with intent that the same should be circulated as currency.

The statute first cited is peremptory and unequivocal, in enacting that all notes like those declared on in this action, made *or* issued after the first day of April, 1805, shall be utterly void; and it prohibits the sustaining of any suit upon them in any court of law. The defendants say, and they offered to prove, that some of the notes sued in this action *were* made and issued after that day. To reject the proofs of these facts, because the defendants are the original promisors, and because the plaintiffs may be supposed to be innocent holders of the notes for valuable considerations, would be, to all intents and purposes, to defeat the operation of the statute, and would amount to a judicial repeal of an act of the legislature.

The maker of a note payable to bearer is generally the only person to be called upon for payment, it passing from hand to hand, on the credit of the promisor's name, like bank-bills, the receiver seldom requiring any guaranty from him who passes it. Now, the declared object of the legislature was entirely to prevent the circulation of such paper. But if, by giving a fictitious date to them, the maker is prevented from showing that they were made or issued after the time when they were declared by the statute to be void, they would continue to circulate, as long as there should be confidence in the ability of the makers to pay them.

However hard the operation of the statute may appear to be against persons into whose possession such notes may have come bona fide and for a valuable consideration, it is a hardship created by law for the public good, and the courts of law are prohibited from granting any relief against it.

Nor is it altogether certain that the receivers of such notes are free from blame, although not privy to the actual making or antedating of them. The laws of the government are presumed to be known by all the citizens. If the notes were *in fact* made or issued after they were declared void by statute, and after a penalty was attached to the passing of them, although no penalty is expressly enacted against the receiver; yet the act of receiving was necessary to enable the offender to pass them, and in this view the receiver may be considered as having aided in the offence of passing. Nor is it improbable that the legislature contemplated the punishment of the receiver, when they took from him all power of coercing payment of such notes in the courts of law. But be this as it may, whether the plaintiffs in this action are innocent or not, to authorize them to maintain a suit, and recover judgment on notes of this description so situated, when the legislature has declared them to be utterly void, would be effectually to annul an act, the wisdom and policy of which the legislature alone had the right to determine.

Nor is it a novel doctrine that a person shall be permitted to avoid his contract by alleging his own criminality, provided it consists in the violation of some positive statute of the government. Contracts, the consideration of which is money won at play, or loaned at unlawful interest, have always been subject to the same rule, not only against those who participated in the offence, but even against innocent indorsees, when they have claimed the performance of such contracts.

The case of Lowe *v.* Waller, 2 Doug. 736, shows this long to have been the law in England; and it is understood that the like principle has been uniformly adopted and practised upon by the courts in this country.

It has been suggested by the counsel for the plaintiffs in the close of their argument that, to make this a good defence, it should have been specially pleaded. But it is not necessary; for in assumpsit, everything which destroys the right of action may be given in evidence under the general issue.

Indeed, there seems to be no room to doubt upon this question; and nothing but a reluctance to permit a man to avail himself of a falsity in circulating these notes, and afterwards to avoid payment by showing the truth, could have caused a hesitation at the trial.

The verdict must be set aside, and a

New trial granted.

STATE CAPITAL BANK *v.* THOMPSON.

Supreme Court of New Hampshire, June, 1861. 42 N. H. 369.

A negotiable promissory note delivered on Sunday is valid in the hands of an indorsee for value without notice.

Assumpsit against the makers of a promissory note payable to order and indorsed by the payees to the plaintiff. Agreed facts: The note was not dated at first, but the date

was afterwards inserted by the payees in accordance with agreement made when it was executed. The note, though written upon a week day, was signed and delivered to the payees on Sunday. The plaintiff bank discounted the note for value and without notice.

NESMITH, J., for the court. — It is well settled that, as between the original parties to a promissory note, the defendant may show either the want of consideration or the illegality of it. In this State, under the construction of our statute prohibiting unnecessary labor on Sunday, the execution and delivery of a promissory note upon Sunday has been declared 'business of a person's secular calling,' and generally an act to the disturbance of others, and as such is prohibited under a penalty, and when subjected to it amounts to an implied prohibition of the act for which the penalty is inflicted. Brackett *v.* Hoyt, 28 N. H. 267; Allen *v.* Deming, 14 N. H. 133; Smith *v.* Foster, 41 N. H. 215. The case of Allen *v.* Deming was founded on a promissory note originally made on Sunday and indorsed to the plaintiff. The decision is based upon the ground that the plaintiff in this case could not be presumed to be or treated as an innocent indorsee. The fact is here found otherwise. It then becomes material to inquire how far the negotiable note in suit, having come in the ordinary course of business into the hands of a bona fide holder for a valuable consideration, and without notice of any defect in the same, can now be impeached in the hands of the present plaintiff.

We understand that the rule adopted and acted upon in England is, that when the legislature has declared that the illegality of the contract or the consideration shall make the note absolutely void, the defendant may set up that defence, though in the hands of a bona fide holder. But unless it has been so expressly declared by parliament, illegality of consideration will be no defence against a bona fide holder without notice and for a valuable con-

sideration, or unless the note be obtained after it became due and payable. Lowe *v.* Waller, 2 Doug. 735; Chitty on Bills, 58, 104, and cases cited.

This rule is applied to cases affected by usury, and to such as come within the penalties of the statutes prohibiting gaming. We believe the New York and Massachusetts courts adhere to the same rule. 3 Kent's Com. 44; Valette *v.* Parker, 6 Wend. 620; Baker *v.* Arnold, 3 Caines, 279; Story on Bills, 222; Bayley on Bills, 512–516. The same principle has been adopted in this State where the sale of spirituous liquors has been prohibited by penal enactment. In Doe *v.* Burnham, 31 N. H. 426, the defence was that the note in suit was given for spirituous liquors sold to the defendant by the payee of the note, contrary to the statute, etc. But it having been shown that the plaintiff, before the maturity of the note, took it on good consideration and without notice of any illegality in the consideration of the same, the defendant was refused the right to set up this defence. Norris *v.* Langley, 19 N. H. 423; Great Falls Bank *v.* Farmington, 41 N. H. 32. So also, where part of the consideration of the note is illegal, and the holder occupies the position of an innocent indorsee. Clark *v.* Ricker, 14 N. H. 44. But if the notes be taken when overdue or dishonored, the illegality of the consideration can be shown as matter of defence. Ayer *v.* Hutchins, 44 Mass. 370.

The statutes for the observance of the Lord's day and also for restraining the sale of spirituous liquors were doubtless both intended for the welfare and security of society and for the promotion and enforcement of good morals and right conduct in the community. The statutes are both penal in their character, and similar legal consequences should be made to attach to their violation. In the construction and application of these statutes to contracts made under them the court will apply like rules and exceptions. We agree to the conclusion of Justice Savage in Valette *v.* Parker, before referred to: 'It is all import-

ant to the commercial world that courts do not go in advance of the legislature in rendering negotiable paper void in the hands of an innocent indorsee. Wherever the statutes declare notes void, they are and must be so in the hands of every holder; but where they are adjudged by the court to be so for failure or the illegality of consideration, they are void only in the hands of original parties or those who are chargeable with or have had notice of the illegality of the consideration therein contained.' We also understand our conclusion to be in accordance with the recent decision of the court in the case of Clarke *v.* Pease, 41 N. H. 414.

. . . . . .

Judgment for the plaintiff.

GOODMAN *v.* HARVEY.

King's Bench of England, Easter, 1836. 4 Ad. & E. 870.

Gross negligence by an indorsee in the purchase of a negotiable bill will not disentitle him to claim as a bona fide holder for value.

Assumpsit on a bill of exchange drawn by the defendants, payable to the order of John Scott, indorsed by Scott, and, later, by David Levy to the plaintiff. The first count alleged non-acceptance, the second, non-payment. Plea, non assumpsit.

The bill was given by the defendants, merchants at Limerick, to Scott, for a balance of freight. Scott put the bill into the hands of one Hudson to procure a discount of it for him (Scott), and Hudson handed it to Levy for the same purpose. The drawees refused acceptance in consequence of receiving from the defendants a notice warning them not to pay any money to Scott, as the party giving notice was about forthwith to sue out a commission of bankrupt against him.[1] The bill was noted for non-

[1] The commission afterwards issued, and this action, it was understood, was defended by Scott's assignees.

acceptance, and protested. No notice of the non-acceptance was given to the defendants. Levy now returned the bill to Hudson, who gave it back to Scott. Scott soon afterwards gave it to Hudson again to obtain a discount of it. Hudson now placed the bill as before in the hands of Levy, who, before maturity, but in fraud of Scott, indorsed and procured it to be discounted by the plaintiff. Levy retained the proceeds, and had never given value for the bill.

When the bill became due the plaintiff presented it for payment, and payment was refused. The drawees had funds, but the right to the proceeds was contested. The funds were furnished a day or two before; at the time of non-acceptance the drawees had not funds. The bill was protested for non-payment, and notice sent to the defendants.

It was objected for the defendants that the plaintiff, in taking the bill from Levy with the notarial marks upon it, had been guilty of gross negligence, and therefore took the bill with all its vices, and so could have no better right to recover upon it than Levy himself, who clearly would have had none. The Lord Chief Justice [Denman] was of the same opinion, observing that the plaintiff had received the bill with a death-wound apparent on it. The jury, in answer to a question from the Lord Chief Justice, said that, in their opinion, the notary's marks on the bill were sufficient notice to an indorsee of non-acceptance.

A nonsuit was then taken; and in the next term motion for a new trial was made, on the ground that the ruling against the plaintiff was wrong; that the bill had been lawfully sent into the market by Scott while not yet due; and that the plaintiff, who had taken it before maturity and had given value for it, had a right to recover the amount, notwithstanding any defect in the title of an intermediate party. A rule nisi was granted; in the argument of which it was urged, and conceded by the court, that the defendants were not entitled to notice of the non-acceptance.

Lord Denman, C. J. — The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of mala fides, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should have been taken in perfect good faith. The rule must be absolute.

Littledale, Patteson, and Coleridge, JJ., concurred.

Rule absolute.

The plaintiff took the bill with notice, in the notarial marks, that acceptance had been refused; but the defendants were not entitled to notice of dishonor, and the notarial marks did not necessarily suggest that the *defendants* had any other defence to the bill than want of notice. It was only a case in which the marks might have put a more careful man upon inquiry; an inquiry which might have led to a discovery of the fraud on Scott, thus bringing to light the defence.

Excepting the single case of taking in bad faith, — that is, where, in case of an equity, the taker *suspects* an equity, but will not inquire, — this decision leaves nothing of the doctrine of constructive notice by putting upon inquiry. One is not put upon inquiry unless one in fact suspects. That is the rule in England, and the more general rule in this country. But a few of our courts adhere to the doctrine of constructive notice to the full, and fix upon the purchaser the disability of notice wherever a prudent man would inquire. Bills and Notes (Students' Series), 207-210.

BAY *v.* CODDINGTON.

Court of Chancery of New York, 1821. 5 Johns. Ch. 54.

A creditor receiving a negotiable promissory note from his debtor, subsequently to the creation of the debt, as further security, does not become thereby a holder for value.

The plaintiff being owner of a vessel, employed Randolph & Savage, defendants, who were carpenters, to sell her on a credit, and take good notes in payment, and transmit the same to him, with an account of their charges, which he would pay. R. and S. sold the vessel for $3,875, and, on the 3d of June, 1819, received the notes of the purchasers, payable in two, three, and four months, some of them being made payable to, and indorsed by, P. Aymar & Co., and the others by J. R. Stewart. On the 12th of June, 1819, R. and S. delivered the notes so indorsed to the defendants, J. and C. Coddington, who were at that time, as they stated in their answer, under heavy responsibilities for R. and S., as indorsers of notes for their accommodation, payable at different times, but all subsequent to the 12th of June, 1819, which they were afterwards obliged to take up as they fell due, amounting to $17,000. The answers admitted that R. and S. had stopped payment, when the notes so held by them were to be delivered to J. and C. Coddington.

The defendants, J. and C. Coddington, denied all knowledge of the manner in which the notes had come to the hands of R. and S., and alleged that they believed that they were the bona fide and exclusive property of R. and S.; that they received these notes, with others, as a guaranty and indemnity, as far as they would avail, for their responsibilities; and, three days after, disposed of some of the notes for cash, and did not know, until several days afterwards, that the notes belonged to the plaintiffs, as stated in the bill. They admitted that, when they so received the notes, R. and S. were not, in a strict legal sense, indebted

to them; but that they were under large gratuitous responsibilities for them.

No proofs were taken, and the cause came on to be heard on the pleadings only.

KENT, CHANCELLOR. — It is admitted that Randolph & Savage held the notes belonging to the plaintiff, which they transferred to the defendants, J. and C. Coddington, on the 12th of June, 1819, as agents or trustees for the plaintiff, and that they had no authority to pass them away. It was a gross and fraudulent abuse of trust, on the part of R. and S. The only question now is, whether J. and C. C. are entitled, under the circumstances disclosed, to hold the notes, and retain the amount of them as against the plaintiff.

Negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But the defendants, J. and C. C., have not entitled themselves to the protection of holders of that description. The notes were not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created or responsibility incurred, on the strength and credit of the notes. They were received from R. and S., and after they had stopped payment, and had become insolvent within the knowledge of J. and C. C., and were seized upon by the Coddingtons, as tabula in naufragio, to secure themselves against contingent engagements, previously made for R. and S., and on which they had not then become chargeable. There is no case that entitles such a holder to the paper, in opposition to the title of the true owner. They were not holders for a valuable consideration, within the meaning or within the policy of the law.

In Miller *v.* Race, 1 Burr. 452, a bank-note was stolen,

and came to the hands of the plaintiff, and he was held entitled to it. But the Court of King's Bench considered bank-notes as cash, which passed as money in the way of business; and the holder, in that case, came by the note for a full and valuable consideration, by giving money in exchange for it, in the usual course of his business, and without notice of the robbery, and on those considerations he was entitled to the amount of the note. So, in Grant *v.* Vaughan, 3 Burr. 1516, 1 W. Black. 785, a bill of exchange, payable to bearer, was lost, and the finder paid it to a grocer for teas, and took the change. There the court laid stress on the facts that the holder came by the bill bona fide, and in the course of trade, and for a full and fair consideration, and that, though he and the real owner were equally innocent, yet he was to be preferred, for the sake of commerce and confidence in negotiable paper. Again, in Peacock *v.* Rhodes, 1 Doug. 633, a bill of exchange, with a blank indorsement, was stolen and negotiated to a person who took it in the way of his trade, for cloth sold and cash for the balance, and he was held entitled to hold it. Lord Mansfield placed reliance on the circumstance that it was received in the course of trade. It was 'by reason of the course of trade, which creates a property in the assignee or bearer,' that Holt, C. J., 1 Salk. 126, Anon., held, that the owner of a bank-bill, which was lost and transferred by the finder to C. for a valuable consideration, could not maintain an action against C. It will not be necessary to go further in support of the principle which uniformly pervades the cases upon this point, and I shall conclude with the case of Collins *v.* Martin, 1 Bos. & Pul. 648, in which it was decided that, if bills of exchange, indorsed in blank, be deposited with a banker, to be received when due, and the banker raises money on them by pledging them to C., and then becomes bankrupt, C. could not be sued by the real owner, as he took them innocently, without knowledge of the previous circumstances. But it is to be observed that

C. there advanced money to the banker, on the credit of the bills; and, as Eyre, C. J., observed in that case: 'If it can be proved that the holder gave no value for the bill, then, indeed, he is in privity with the first holder, and affected by all that will affect him.'

In short, I have not been able to discover a case in which the holder of negotiable paper, fraudulently transferred to him, was deemed to have as good a title, in law or equity, as the true owner, unless he received it not only without notice, but in the course of business, and for a fair and valuable consideration given or allowed on his part, on the strength of that identical paper. It is the credit given to the paper, and the consideration bona fide paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it.

I shall accordingly declare, that the defendants, J. and C. Coddington, are not entitled to the notes or the proceeds thereof, as against the plaintiff, who was the lawful owner of them when they were transferred to those defendants, inasmuch as they did not receive the notes in the course of business, nor in payment, in whole or in part, of any then existing debt, nor for cash or property advanced or debt created or responsibility incurred on the credit of the notes. And I shall direct that it be referred to a master to compute the amount of the said notes, with interest thereon from the times they were respectively payable, to the time of making the report; and that all the defendants in the amended bill, or some or one of them, pay to the plaintiff the sum that shall be reported as the amount of the said notes, with interest, as aforesaid, within thirty days after the master shall have made and filed his report, and notice thereof, and of this decree, or that the plaintiff may have execution therefor, against all or either of the said defendants, according to the course and practice of the court.

And it is further ordered, that the defendants, R. and S., pay to the plaintiff his entire costs of this suit, to be taxed, including the costs of the original bill, and that the plaintiff give credit upon the costs so to be taxed, the charges and commissions due from him to the said defendants, R. and S., upon the sale of the vessel in the pleadings mentioned, and amounting to $96.87; and that he have execution for the balance of costs, after such deduction, against them, the said R. and S., according to the course and practice of the court. And it is further ordered that no costs be taxed or allowed to the plaintiff, or to the defendants, J. and C. C., as against each other.

Decree accordingly.[1]

Wt. of authority

SWIFT *v.* TYSON.

Supreme Court of United States, January, 1842. 16 Peters, 1.

The bona fide holder of a bill of exchange, who has taken it before maturity in payment of or security for[2] a pre-existing debt, without notice of any equities between the drawer and acceptor thereof, will not be affected by such equities.

The case is stated in the opinion of the court.

STORY, J., for the court. — This cause comes before us from the Circuit Court of the Southern District of New York, upon a certificate of division of the judges of that court.

The action was brought by the plaintiff, Swift, as indorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange, dated at Portland, Maine, on the first day of May, 1836, for the sum of $1,540.30, payable six months after date and grace, drawn by one Nathaniel Norton and one Jairus S. Keith upon and accepted by

[1] This case was affirmed in the Court of Errors, in 1822. 20 Johns. 637

[2] See Bills and Notes (Students' Series), 216, note.

Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton indorsed to the plaintiff. The bill was dishonored at maturity.

At the trial, the acceptance and indorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note, due to him by Norton and Keith; that he understood that the bill was accepted in part payment of some lands sold by Norton to a company in New York; that Swift was a bona fide holder of the bill, not having any notice of anything in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not seem necessary further to state them. The defendant then offered to prove that the bill was accepted by the defendant as part consideration for the purchase of certain lands in the State of Maine, which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the Circuit Court thereupon divided in opinion upon the following point or question of law: Whether, under the facts last mentioned, the defendant was entitled to the same defence to the action as if the suit was between the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant; and whether the

evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt that a bona fide holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there that the holder of any negotiable paper, before it is due, is not bound to prove that he is a bona fide holder for a valuable consideration, without notice; for the law will presume that in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence satisfactory proofs of the contrary, and thus to overcome the prima facie title of the plaintiff.

In the present case, the plaintiff is a bona fide holder, without notice, for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles as by the express provisions of the 34th section of the Judiciary Act of 1789, c. 20. And then it is further contended that, by the

law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.

In the first place, then, let us examine into the decisions of the courts of New York upon this subject. In the earliest case, Warren *v.* Lynch, 5 Johns. 239, the Supreme Court of New York appear to have held that a pre-existing debt was a sufficient consideration to entitle a bona fide holder without notice to recover the amount of a note indorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent, in Bay *v.* Coddington, 5 Johns. Ch. 54.[1] Upon that occasion, he said that negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But he added that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes, thus directly affirming that a pre-existing debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his Commentaries. 3 Kent, Com. § 44, p. 81. The decision in the case of Bay *v.* Coddington was afterwards affirmed in the Court of Errors, 20 Johns. 637, and the general reasoning of the Chancellor was fully sustained. There were, indeed, peculiar circumstances in that case, which the court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground, either because the receipt of the notes was under

[1] Ante, p. 296.

suspicious circumstances, the transfer having been made after the known insolvency of the indorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holders had not then become charged. There was, however, a considerable diversity of opinion among the members of the court upon that occasion, several of them holding that the decree ought to be reversed, others affirming that a pre-existing debt was a valuable consideration, sufficient to protect the holders, and others again insisting that a pre-existent debt was not sufficient. From that period, however, for a series of years, it seems to have been held, by the Supreme Court of the State, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties, in favor of the holders. But no case to that effect has ever been decided in the Court of Errors. The cases cited at the bar, and especially Rosa *v.* Brotherson, 10 Wend. 85, The Ontario Bank *v.* Worthington, 12 Wend. 593, and Payne *v.* Cutler, 13 Wend. 605, are directly in point. But the more recent cases, The Bank of Salina *v.* Babcock, 21 Wend. 499, and The Bank of Sandusky *v.* Scoville, 24 Wend. 115, have greatly shaken, if they have not entirely overthrown, those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain that the Court of Errors have not pronounced any positive opinion upon it.[1]

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general

[1] But see Bills and Notes (Students' Series), 215.

principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides 'that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation; as, for example, to the construction of ordinary contracts or other written instruments, and especially to

questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in Luke *v.* Lyde, 2 Burr. 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world. 'Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.'

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration, in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it

in the usual course of trade and business for a valuable consideration, before it becomes due; we are prepared to say that receiving it in payment of, or as security for a pre-existing debt, is according to the known usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of, or as security for, pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this court, and it has been uniformly held that it makes no difference whatsoever as to the rights of the holder, whether the

debt for which the negotiable instrument is transferred to him is a pre-existing debt, or is contracted at the time of the transfer. In each case, he equally gives credit to the instrument. The cases of Coolidge *v.* Payson, 2 Wheat. 66, 70, 73, and Townsley *v.* Sumrall, 2 Pet. 170, 182, are directly in point.

In England, the same doctrine has been uniformly acted upon. As long ago as the case of Pillans and Rose *v.* Van Mierop and Hopkins, 3 Burr. 1663, the very point was made, and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the bill of exchange, there drawn in discharge of a pre-existing debt, was held to bind the party as acceptor, upon a mere promise made by him to accept before the bill was actually drawn. Upon that occasion, Lord Mansfield, likening the case to that of a letter of credit, said that a letter of credit may be given for money already advanced, as well as for money to be advanced in future; and the whole court held the plaintiff entitled to recover. From that period downward, there is not a single case to be found in England, in which it has ever been held by the court, that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental dicta have been sometimes relied on to establish the contrary, such as the dictum of Lord Chief Justice Abbott in Smith *v.* De Witts, 6 Dowl. & Ryl. 120, and De la Chaumette *v.* The Bank of England, 9 Barn. & Cress. 208, where, however, the decision turned upon very different considerations.

Mr. Justice Bayley, in his valuable work on Bills of Exchange and Promissory Notes, lays down the rule in the most general terms. 'The want of consideration,' says he, 'in toto or in part, cannot be insisted on, if the plaintiff, or any intermediate party between him and the defendant, took the bill or note bona fide and upon a valid consideration,' Bayley, Bills, pp. 499, 500, 5th London edition, 1830. It is observable that he here uses the words

'valid consideration,' obviously intending to make the distinction, that it is not intended to apply solely to cases where a present consideration for advances of money on goods or otherwise takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go further, and establish that a transfer as security for past and even for future responsibilities, will, for this purpose, be a sufficient, valid, and valuable consideration. Thus, in the case of Bosanquet *v.* Dudman, 1 Stark. 1, it was held by Lord Ellenborough, that if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill he holds of that customer's, bona fide, he is to be considered as holding for value; and it makes no difference, though he hold other collateral securities more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord Eldon in Ex parte Bloxham, 8 Ves. 531, as equally applicable to past and to future acceptances. The subsequent cases of Heywood *v.* Watson, 4 Bing. 496, and Bramah *v.* Roberts, 1 Bing. N. C. 469, and Percival *v.* Frampton, 2 Cromp., Mees., & Rosc. 180, are to the same effect. They directly establish that a bona fide holder taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions which our researches have enabled us to ascertain to have been made in the English courts upon this subject.

In the American courts, as far as we have been able to trace the decisions, the same doctrine seems generally, but not universally, to prevail. In Brush *v.* Scribner, 11 Conn. 388, the Supreme Court of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a bona fide holder against

all the antecedent parties to a negotiable note. There is no reason to doubt that the same rule has been adopted and constantly adhered to in Massachusetts; and certainly there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial States, it may fairly be presumed that whatever constitutes a valid and valuable consideration in other cases of contract, to support titles of the most solemn nature, is held, a fortiori, to be sufficient in cases of negotiable instruments, as indispensable to the security of holders and the facility and safety of their circulation. Be this as it may, we entertain no doubt that a bona fide holder for a pre-existing debt of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.

CATRON, J., said: Upon the point of difference between the judges below, I concur that the extinguishment of a debt, and the giving a *post* consideration, such as the record presents, will protect the purchaser and assignee of a negotiable note from the infirmity affecting the instrument before it was negotiated. But I am unwilling to sanction the introduction of a doctrine into the opinion of this court, aside from the case made by the record, or argued by the counsel, assuming to maintain that a negotiable note or bill, pledged as collateral security for a previous debt, is taken by the creditor in the due course of trade; and that he stands on the foot of him who purchases in the market for money, or takes the instrument in extinguishment of a previous debt. State courts of high authority on commercial questions have held otherwise;

and that they will yield to a mere expression of opinion of this court, or change their course of decision in conformity to the recent English cases referred to in the principal opinion, is improbable; whereas, if the question were permitted to rest until it fairly arose, the decision of it either way by this court probably would, and I think ought, to settle it. As such a result is not to be expected from the opinion in this cause, I am unwilling to embarrass myself with so much of it as treats of negotiable instruments taken as a pledge. I never heard this question spoken of as belonging to the case until the principal opinion was presented last evening; and therefore I am not prepared to give any opinion, even was it called for by the record.

PATON v. COIT.

Supreme Court of Michigan, October, 1858. 5 Mich. 505.

Whenever the consideration of negotiable paper between the original parties has been illegal, especially if it is as to them in violation of a positive prohibition of statute, proof of such illegality throws upon the indorsee the burden of proving that he took it bona fide and gave value for it.

Assumpsit against the acceptors of a bill of exchange given for intoxicatng liquors sold in violation of the Prohibitory Liquor Law, which makes such paper 'utterly null and void against all persons, and in all cases, excepting only as against the holders, . . . who may have paid therefor a fair price, and received the same upon a valuable and fair consideration, without notice or knowledge of such illegal consideration.' The plaintiffs were indorsees of the payees.

On the trial, the acceptance having been given in evidence, the plaintiff rested. The defendant then introduced a witness, and being required to state what he expected to prove by such witness, stated that he expected to prove that such acceptance was given in payment and as security

for ten barrels of intoxicating liquor, called whiskey, purchased by defendant, of the drawers of said draft, on the thirtieth day of March, 1857, in Detroit.

The plaintiffs objected to such evidence, upon the ground that under the exception in section two of the Prohibitory Liquor Law of 1855, the presumption was that said draft was in the hands of bona fide holders, to wit, the plaintiffs; and that the onus was on the defendant to show, or propose to show, notice before said testimony could be received. The court sustained the objection, and refused to allow the testimony to be given; and defendant excepted.

Judgment having been rendered for plaintiffs below, for the amount of the acceptance, the defendant brought the case to this court by writ of error.

CHRISTIANCY, J., for the court. — Whether the evidence in this case was properly rejected, does not depend upon the question, Whether, standing alone, it would have constituted a complete defence against the draft in the hands of a bona fide holder for value; but, Whether it would have been sufficient to throw upon the plaintiff the burden of proving himself to be such bona fide holder; or, Whether, in fact, the evidence tended, prima facie, to establish a defence.

It is assumed by the counsel for the defendants in error (plaintiffs below) that the only effect of the statute in reference to negotiable paper given for liquors sold, 'is to render such paper without consideration as between the immediate parties,' and that 'the effect of the exception in section two is simply to put this statute *equity* on a footing with all other equities, between the original parties to negotiable paper.

If this be the only effect of the statute, then, according to the prevailing current of recent decisions, the evidence was properly rejected, though the cases upon this point are by no means uniform; and we do not wish to be under-

stood as giving any opinion upon the question presented by this hypothesis, as we do not think it involved in the present case.

The defence here proposed was not merely the *want*, but the *illegality* of consideration; and this being allowed as a defence between the original parties, irrespective of and even contrary to the equities of the parties, cannot, without perversion of language, be called an equity. It is not on the defendants' account that such a defence is allowed, as will more fully appear in the sequel.

The effect of the statute in question is not merely to render such paper without consideration, but absolutely *void and illegal*, between the immediate parties, and all others who have not obtained it for value, and without notice, — not only void in the negative sense of having no legal basis, but affirmatively illegal as violating the positive provisions of the statute. It was not even contended that the facts offered to be shown by the defendant would not have made a prima facie case of an illegal sale, without showing that the sale did not come within any of the exceptions of the statute; and if the plaintiffs claimed to maintain the validity of the sale under any such exception, the burden of proof (this being a civil case) rested upon them to bring it within the exception.

Now, upon principle, as a question of statute construction, and without reference to any authority, when the statute expressly declares all such paper void and illegal, and forbids any action to be brought or maintained upon it, 'except when brought by a bona fide holder who has received the same upon a valuable and fair consideration without notice or knowledge,' etc., it would seem to follow as a logical necessity, that when the paper is shown to have been given for such illegal consideration, the plaintiff's right of recovery is cut off by the general prohibition of the statute, unless, in avoidance of this, he gives evidence of those facts which alone can bring him within the exception.

We do not propose to give a definite opinion upon the point, whether, the illegality being first shown, the burden of proof in this case would have rested upon the plaintiffs to show actual want of notice; this might be requiring actual proof of a negative. But we are inclined to the opinion that they should have shown the nature of the transaction accompanying the transfer; and if that disclosed no suspicion of such notice, it might make a prima facie case of want of notice, and throw upon the defendant the burden of proving notice. But the amount of the consideration given by the plaintiff is distinct from the question of notice, and the absence of such consideration, in such a case, would be a defence, though the paper had been taken by the plaintiff without notice. The amount of consideration given by the plaintiff is an affirmative fact peculiarly within his own knowledge, and not generally in that of the defendant, and being necessary to bring the plaintiff's case within the exception of the statute, should be proved by him. To allow him to recover without such proof would be an evasion of the statute. Such proof (the illegality being first shown) is a necessary part of the plaintiff's case, without which he shows no prima facie right to recover; and though, in ordinary cases, this fact would be presumed in favor of the holder, this presumption can never be allowed without proof when the paper was absolutely void between the original parties, on the ground of fraud, illegality, or duress.

This construction of the statute is sustained by authority. In England, by the statute of Anne, a note or bill given or indorsed upon a usurious consideration was void, even in the hands of a bona fide holder for value. Chitty, Bills, 9 Am. ed., 110. But the Stat. 58 Geo. III. c. 93 made such note valid in the hands of a bona fide holder for value without notice. In the case of Wyat *v.* Campbell, Mood. & M. 80, where the note had been indorsed by a previous indorser, upon a usurious consideration, and no notice given to plaintiff to prove consideration, it was contended

that the plaintiff was not bound to prove it. But, by Lord Tenterden, C. J.: 'The statute 58 Geo. III. c. 93 makes a note tainted with usury valid in the hands of a bona fide holder. The onus is, therefore, upon the holder to prove he is such, otherwise the statute does not apply, and the note is void under the statute of Anne.'

In that case, it is true, the exception was in a subsequent statute; here it is in the same statute; but we are unable to perceive how this can make any difference as to the burden of proof. If the fact was not to be presumed in that case, it cannot be in this.

But whether this conclusion be right or wrong as depending purely upon a question of statute construction, can make little difference in this case. The rule as to the burden of proof is the same upon principle and authority at common law. Whenever the consideration of the paper between the original parties has been illegal, especially if in violation of a positive prohibition of statute, proof of such illegality throws upon the holder the burden of proving that he got it bona fide, and gave value for it. Northam *v.* Latouche, 4 Car. & P. 140; Bailey *v.* Bidwell, 13 Mees. & W. 73; Harvey *v.* Towers, 6 Exch. 656; Smith *v.* Braine, 16 Q. B. 201; Fitch *v.* Jones, 32 Eng. Law & Eq. 134; Vallet *v.* Parker, 6 Wend. 615; Edwards, Bills, 686, 687; Chitty, Bills, 11th Am. ed. 661, 662; Story, Bills, § 193.

The case of Bailey *v.* Bidwell is directly in point; and Parke, B., gives a very satisfactory reason why the fact in question is not to be presumed for the plaintiff. 'If,' he says, 'the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it.' The subsequent case of Fitch *v.* Jones, above cited, shows that in such case the original payee is still presumed to be the owner, and that the plaintiff sues for his benefit; and it is to overcome this

presumption that the plaintiff is required to prove himself a bona fide holder for value.

The rule is the same as to the burden of proof, where it is shown that the paper was obtained by fraud or duress, and when stolen, or put in circulation by fraud. See authorities above cited, and Mills *v.* Barber, 1 Mees. & W. 425; Holme *v.* Karsper, 5 Binn. 469; Aldrich *v.* Warren, 16 Me. 465; N. Y. & Va. State Stock Bank *v.* Gibson, 5 Duer, 574. In fact, many of the cases, and most of the elementary works, place illegality in the same category with fraud or duress, as casting the burden of proof upon the holder.

But, while the result is the same, it is manifest that the basis of the rule in the case of illegality, though equally solid, is quite different. In the case of duress and fraud, as well as where the paper has been stolen, the *equities* of the defendant constitute the basis of the rule. But in the case of illegality of consideration, both parties are generally equally in fault; and it is not to protect the equities of the defendant, but on broad grounds of public policy, — to uphold the law, and to discourage its violation or evasion, — that the burden of proof is cast upon the plaintiff. It is as much the duty of courts to discourage the violation or evasion of law as to protect the equities of parties. And it is upon this principle only that the naked defence of illegality is allowed. See opinion of Lord Mansfield, in Holman *v.* Johnson, 1 Cowp. 341. And, upon this principle, courts should be careful to avoid doing anything to facilitate the enforcement of such contracts, unless it appear affirmatively that the plaintiff is not in fault, and that he has real equities to be protected.

The evidence offered was improperly rejected. The judgment must be reversed, and a

New trial granted.

All the justices concurred.

LEAVITT *v.* PUTNAM.

Court of Appeals of New York, July, 1850. 3 Comst. 494.

Negotiable paper does not lose its negotiable character by being dishonored; not even though indorsed to a particular person without other words.

The case is stated in the opinion of the court.

HURLBUT, J., for the court.— On the 29th day of August, 1844, Messrs. J. W. and R. Leavitt made their note for $1,570.52, payable to the order of T. Putnam & Co. (the defendants), eight months after date. A few days after the maturity of the note, the defendants indorsed it as follows: 'Pay the within to A. Thacher, value received, May 21, 1845. T. Putnam & Co.' Thacher indorsed without recourse, and delivered the note for a valuable consideration to the American Exchange Bank, in whose behalf this action is brought.

On the trial, the defendants urged, among other grounds of objection to the plaintiff's recovery, that the defendants' indorsement was in effect a new draft payable to Thacher only, and not negotiable, so that no action could be maintained upon it in the name of the plaintiff. In this they were sustained by the court, and the plaintiff was nonsuited.

The other objections taken by the defendants on their motion for a nonsuit were not considered by the court below, and under the circumstances of the case cannot be noticed on this appeal; so that the only thing for us to consider is, whether the indorsement of a note made after due differs from one made before maturity in respect to its negotiability. It was conceded on the argument that no express authority could be found sustaining the distinction upon which the decision of the Superior Court was based; but it was urged that the defence could be sustained upon the principle that a dishonored note loses its

mercantile character, and its indorsement becomes an original contract which must be made expressly negotiable in terms, or it could not be held to possess the character of negotiability. There is unquestionably a difference between the indorsement of a note after due and one while it is running to maturity, but this relates only to a single point arising from the necessity of the case; to wit, the time of payment, which, in the latter indorsement, is fixed at a future day by the express agreement of the parties, while in the former it is declared by law to be within a reasonable time, upon demand. But in all other respects the contract is the same as an indorsement in the usual course of trade; and it is difficult to perceive how the single difference referred to can at all affect the negotiability of the indorsement. A bill or note does not lose its negotiable character by being dishonored. If originally negotiable it may still pass from hand to hand ad infinitum until paid by the drawer. Moreover, the indorser after maturity writes in the same form, and is bound only upon the same condition of demand upon the drawer and notice of non-payment as any other indorser. Thus the paper preserves its mercantile existence and retains the main attributes of a proper bill or note, and circulates as such in the commercial community. Exceptions to a general rule affecting so important and numerous a class of transactions as the one under consideration must be productive of great inconvenience, and will not be indulged except for urgent reasons; and nothing has been made to appear in the argument or seems to exist in the case, which warrants the court in treating the ordinary indorsement of a dishonored bill or note as without the law merchant and not negotiable. While it was questioned whether such a note was negotiable, and whether the indorser was chargeable except upon the usual condition of demand and notice, there was perhaps reason enough to sustain the decision of the court below. But since both the note and its indorsement, by a long course of decisions, have been

treated as within the law merchant in respect to their main attributes, the indorsement ought to be regarded as negotiable to the same extent as an indorsement before maturity. The latter follows the nature of the original bill, and is equally negotiable. Edie *v.* The East India Co., 2 Burr. 1216; Mutford *v.* Walcot, 1 Ld. Raym. 574; Allwood *v.* Hazelton, 2 Bailey (S. C.), 457; Bishop *v.* Dexter, 2 Conn. 419; Berry *v.* Robinson, 9 Johns. 121.

The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defendants' indorsement was a full one, containing the name of the person in whose favor it was made, but omitting the words 'or order,' the legal effect of which was, nevertheless, to make the note payable to him or his order, and his indorsement therefore was effectual to transfer the note to the plaintiff. Chitty, Bills, 136; Story, Prom. Notes, § 139.

I am of opinion that the judgment of the Superior Court should be reversed, and a new trial awarded.

Judgment reversed.

CHESTER *v.* DORR.

Court of Appeals of New York, December, 1869. 41 N. Y. 279.

That a promissory note, indorsed while current, without value, for accommodation, was taken after maturity from the accommodated party, though for value, is a defence in favor of the indorser

Action by the holder (begun against an indorser, but now continued) against the executors of an indorser of several negotiable promissory notes. The defendant's testator had indorsed the notes at the request and for the accommodation, without value, of one Myers, who held them at maturity. Holding the notes, unpaid, for two or three years after they became due, Myers now transferred them for full value to the plaintiff's assignor. Verdict, under

direction, for defendant; appeal; report of referee in favor of plaintiff, affirmed on appeal by the General Term, Superior Court of New York. Appeal.

WOODRUFF, J. — Mr. Justice Story, in his Treatise on Promissory Notes, § 178, thus states the difference between the legal effect of a promissory note before and after maturity: 'If the transfer is made before the maturity of the note to a bona fide holder for a valuable consideration, he will take it free of all equities between the antecedent parties of which he had notice. If the transfer is after the maturity of the note, the holder takes it as a dishonored note, and is affected by all the equities between the original parties, whether he has any notice thereof or not.[1] But . . . . it is not to be understood by this expression that all sorts of equities existing between the parties, from other independent transactions between them, are intended; but only such equities as attach to the particular note, and as between those parties, would be available to control, qualify, or extinguish any rights arising thereon.'

The learned author gives this as the final conclusion from the numerous cases cited by him, an examination of which shows that it is only after some difference of opinion that it has come to be deemed settled. Or, as Mr. Chitty says, of the opinion of Buller and Ashhurst, JJ., in Brown *v.* Davis, 3 T. R. 80, expressed when Lord Kenyon doubted its broad extent, 'this latter opinion is now the law.' That opinion was to the effect 'that where a note is overdue, that alone is such a suspicious circumstance as makes it incumbent on the party receiving it to satisfy himself that it is a good one, otherwise much mischief might arise.' 'If a note indorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives

[1] This form of expression would hardly be used at the present day. 'Notice' here is used in the sense of knowledge. Taking after maturity is now considered taking with notice, — notice absolute of equities if any exist. Bills and Notes (Students' Series), 207.

it on its own intrinsic credit. But if it is overdue, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. . . . Generally when a note is due, the party receiving it takes it on the credit of the person who gives it to him.'

The foundation of the rule which distinguished commercial paper from ordinary commercial-law choses in action is in harmony with the law thus stated. The holder of the former is protected against any inquiry into its previous history, and is warranted in giving it full faith, according to its tenor, because commercial convenience and the importance of the free and unembarrassed use of commercial credits require it; and on this the mercantile customs, which ripened into the law merchant, were founded. These reasons, however, could have no application to paper which had been dishonored. The credit it was adapted to invite is spent, and the very fact of dishonor is inconsistent with the purposes which the rule was intended to subserve.

The rule is simple and convenient of application, is in no sense inconsistent with the usefulness of negotiable paper for the purposes for which it is intended, and, as it seems to me, is a just security against mischief and fraud. In the terms in which it is above stated it includes the defence of want of consideration, whenever that renders the note invalid in the hands of him who holds it when it becomes due. Such want of consideration is an inherent defect in the contract itself; or, in the language of the rule, attaches to the note itself, in the hands of one for whose accommodation a note is made, and does not, like a set-off or other collateral matter apart from the note, arise out of an independent transaction.

But the same learned writer above referred to states that the mere fact that an accommodation note has been indorsed after it became due, does not of itself, without some other equity in the maker, defeat a recovery by the

indorsee. Story, § 194. And Mr. Chitty states that it has been so decided. The cases of Charles *v.* Marsden, 1 Taunt. 224, Sturtevant *v.* Ford, 4 Man. & G. 101, 4 Scott, 608, and Caruthers *v.* West, 11 Q. B. 143, are in support of the proposition. These are the cases upon the authority of which the present case was decided below.

I am constrained to say that I am not satisfied that such an exception to the rule is either just or called for by any principle, nor am I at all convinced by the reasons assigned for the exception.

That the maker or indorser of a note for the accommodation of another should be held to the terms of his own indorsement, according to their just interpretation, I fully agree. That one who receives such paper before maturity should not be affected by the mere fact that it was made or indorsed without consideration I equally agree. That when a party lends his note or indorsement to another without restriction as to its use he authorizes the negotiation thereof, in any manner which may serve the convenience or credit of the borrower, may be conceded.

From this latter concession it is argued that such a lending of one's name is furnishing a continuing guaranty of the payment of the note, irrespective of its terms as to time of payment, and is therefore binding whenever it is transferred and however long after it has become payable and been dishonored. That the absence of express restriction warrants the inference that the making or indorsement was to enable the borrower to use it whenever thereafter it suited his pleasure, and so 'enforcing its payment is in accordance with the object for which the note was, as matter of accommodation, made or indorsed;' and in the discussion in England it has been suggested that, supposing an accommodation acceptance to remain in the hands of the party accommodated, it may be treated as giving authority by implication to use it thereafter as his convenience or needs may require.

In respect to the last suggestion two observations are

pertinent; first, it begs the question, for assuming the rule to be that he who receives a note or bill after dishonor acquires no better title to recover thereon than he has from whom it was received, then there is no reason why the accommodation maker or indorser should not treat the note in the hands of the borrower, after maturity, as functus officio, and mere waste paper. And second, how is the maker or indorser in such case to withdraw his note or indorsement? Is he to be driven into a court of equity, and to praying out an injunction, to prevent a subsequent transfer? I think not. Take the present case; the note itself was the property of the holder at its maturity (Myers), and was a valid note in his favor against the maker. The indorsement of the defendant (the appellant's testator) was material as a transfer of title, although, being made for Myers' accommodation, it could not be enforced against such defendant as indorser. I cannot agree that it was incumbent on the defendant to go into a Court of Chancery to compel Myers to suffer a writing of the words 'without recourse' or an equivalent expression as a qualification of such indorsement.

As to the other reason, it is even less satisfactory, because it proceeds, I think, upon an entire misconstruction of the act of making or indorsing a note for the accommodation of another. Its purpose and object is to obtain credit for such other, or to enable him to do so. The very terms of the note declare the credit it is intended to procure, that is to say, until the maturity of the note. Within that range the making or indorsement being unrestricted as to its use, the borrower may use it as his exigencies require, and a transferee may receive it in reliance upon the undertaking which is imported by its terms.

But the very term of payment contained in the note imports that the accommodation party undertakes that the note shall be paid at its *maturity*, and that he who then holds the note shall have recourse to him, if it be not *then*

paid. Where the accommodation (as in the present case) is by indorsement, that is the precise contract, viz., that the note shall be paid at maturity, and not that it shall be paid at any future time. If the note be not paid at maturity, the contract is broken, and if he who then holds it can recover thereon, then his right of recovery may be transferred to another; and the recovery of the latter will be, not because the accommodation indorser undertook that the note should be paid to him, or should be paid at some date after it was due, but because a valid cause of action, existing in favor of the holder at maturity, has been transferred to him.

It is not according to the intent or meaning of an indorsement for another's accommodation to say that the indorser intends to give the use of his credit for any other period than that limited in the note, or that such an indorsement imparts authority to use it when that period has elapsed.

One may be willing by indorsement to guaranty the solvency of another for sixty days, or for six months, and yet he would wholly refuse to do so for a period of two years. And accordingly, when such accommodation is given, it is a most material circumstance that the time during which the borrower is at liberty to obtain credit on the note is fixed by the limitation of the time of payment therein.

I deem the just view of the subject to be that, when a note has become due and is dishonored, the rights and responsibilities of the parties thereto are fixed. The note then loses the chief attribute of commercial paper. It is no longer adapted to the uses and purposes for which such paper is made, and in respect of which it is important that it should circulate freely. And thereafter he who takes it takes it with knowledge of its dishonor, with obvious reason to believe that there exists some reason why it was not paid to the holder; and takes it with just such right to enforce it as such holder himself has, and no other.

In thus stating my views I am not insensible of the apparent authority for the decision made below; but I am also aware that the judges in England have not been at all agreed on the subject, and have expressed doubt of the correctness of the decision in Charles *v.* Marsden, upon which the other two cases above referred to were decided. The cases, largely collected in the notes to Chitty in the recent edition, warrant, I think, the dissatisfaction I have expressed.

No case in this State has called for a decision of the question; and yet in Brown *v.* Mott, 7 Johns. 361, and in Grant *v.* Ellicott, 7 Wend. 227, the case of Charles *v.* Marsden is referred to without disapprobation, and the proposition derived therefrom is stated; but in neither was the point now raised before the court, for in neither did it appear that the plaintiff took the note after it became due. And that in other States in this country such an exception to the general rule first above stated is repudiated, see Brown *v.* Hastings, 36 Penn. St. 285; Britton *v.* Bishop, 11 Vt. 70; Odiorne *v.* Howard, 10 N. H. 343; Cummings *v.* Little, 45 Maine, 183; Vinton *v.* King, 4 Allen, 563; Kellogg *v.* Barton, 12 Allen, 527. And the general proposition that he who takes a note when overdue takes it subject to all defences inherent in the note, or arising out of any agreement with the holder, expressed or implied, and relating thereto, or, in another form, that such an indorsee obtains no greater or other rights than his indorser had in it at the time of the indorsement, has been stated as law in cases almost without number.

It will perhaps suffice to refer to two from the Supreme Court of the United States. Andrews *v.* Pond, 13 Pet. 79, says of the indorsee of a dishonored bill: 'If he chooses to receive it, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it.' Fowler *v.* Brantley, 114 Pet. 321 [says]: 'A note overdue or bill dishonored is a circum-

stance of suspicion to put those dealing for it afterward on their guard, and in whose hands it is open to the same defences as it was in the hands of the holder when it fell due. After maturity such paper cannot be negotiable in the due course of trade, although still assignable.' See also Foley *v.* Smith, 6 Wall. 492.

In my opinion the just rule, and the rule resting on the soundest principle, requires us to reverse. The supposed exception to the general rule rests on neither reason nor, as I think, on authority, certainly not in this country.

. . . . . .

Five other judges for reversal; two judges dissented.

Judgment reversed.

HASCALL *v.* WHITMORE.

Supreme Court of Maine, April, 1841. 19 Maine, 102.

One who purchases commercial paper for value, with notice of defect in its inception, from a bona fide holder without notice, stands upon the rights of the latter, and may recover the amount of the paper.

The case is stated in the opinion of the court.

SHEPLEY, J., for the court. — The plaintiffs are joint owners of a negotiable promissory note purchased before it became payable. One of them is a holder for value without notice; the other with notice, but deriving his title through others who were bona fide holders without notice. As between the original parties the note may be regarded as made without consideration. Andrews, who was the first and an innocent indorsee for value, did not indorse it when he disposed of it, and he was properly admitted as a witness. Whitaker *v.* Brown, 8 Wend. 490. He could have collected it, for the want of consideration could not be set up against him. A knowledge of the facts acquired afterward would not affect his rights. He had not only a legal right to hold and collect it, but to nego-

tiate it. And the maker could not impair that right by giving notice that it was made without consideration. Nor would he be injured by a transfer to one having a full knowledge of the facts; for his position would not be more unfavorable than before.

Bayley states that the want of consideration cannot be insisted upon 'if the plaintiff, or any intermediate party between him and the defendant, took the bill or note bona fide and upon a valuable consideration.' Bayley, 550, ed. by Phillips & Sewall.

The case of Thomas *v.* Newton, 2 Car. & P. 606, was assumpsit on a bill drawn by Wilson on the defendant and accepted, and by him indorsed to Dandridge and by him to the plaintiff. The defence was a want of consideration. Lord Tenterden says: 'If the defendant shows that there was originally no consideration for the bill, that throws it on the plaintiff to show that he gave value for it, or that value was given for it by Dandridge;[1] for if either the plaintiff or Dandridge gave value for it, the plaintiff may recover; otherwise the defendant is entitled to recover.'

In Solomons *v.* The Bank of England, 13 East, 134, 135, note *b*, it appeared that the bank-note had been obtained fraudulently from Batson & Co., who informed the bank of it. The plaintiff as holder claimed payment of the bank, and it was refused. He had received the bill of Hendricks & Co.; and it did not appear that he paid value for it before notice. Lord Kenyon says, 'Upon this evidence I think Solomons must be considered to be in the same situation as Hendricks & Co.' But as it did not appear that they were holders for value without notice, the plaintiff did not recover.

In Smith *v.* Hiscock, 14 Maine, 449, where a negotiable promissory note had been indorsed bona fide and for value before it was payable, the Chief Justice says: 'The want of consideration is not an available defence against a sub-

[1] This doctrine has been exploded. See Bills and Notes (Students' Series), 224; Paton *v.* Coit, ante, p. 311.

sequent holder, to whom it may have been passed after it was due. The promise is good to the first indorsee free from that objection; and the power of transferring it to others with the same immunity is incident to the legal right which he had acquired in the instrument. By the first negotiation the want of consideration between the original parties ceases as a valid ground of defence.'

If the relations between the maker and the holder only were to be considered, the want of consideration would be a good defence against one who did not purchase for value, or who did so after it was once due. And yet it has been decided that one so situated may avoid that defence by showing that it could not have been interposed against a prior holder. The same principle appears to be equally applicable to a holder who has purchased with notice. If the relations between himself and the maker only were to be considered, he could not recover; but purchasing of one who had no notice, he must be considered to be in the same situation and as entitled to the same protection.

Defendant defaulted and judgment for amount due on the note.

NEWCOMB *v.* RAYNOR.

Supreme Court of New York, May, 1839. 21 Wend. 108.

If the holder of a promissory note release the first indorser, this discharges the subsequent indorsers.

Assumpsit against the maker and second and third indorsers of a promissory note. Plea by the indorsers that the holder had given a release under seal to Goings, the first indorser. Demurrer to the plea.

Nelson, C. J., for the court. — I am of opinion the plea constitutes a good bar to the action. As between the first and subsequent indorsers, the former must be regarded in the light of principal; he stands behind them upon the paper, and is bound to take it up, in case of default of

the maker. A discharge of him, therefore, by the holder (regarding the relative position of the parties), on general principles, operates to release them.

It is said their rights are not prejudiced, as they may still resort to an action against him if subjected to the payment of the note, as the release leaves the implied contract existing between the first and subsequent indorsers unimpaired. Conceding this to be so, to permit a recovery against the defendants would but lead to an unnecessary circuity of action. The plea shows a discharge for a presumed good consideration (as it is under seal) of the first indorser, and it cannot be doubted, as the case stands, that if the defendants should be obliged to call upon him, the plaintiff would be bound to take his place. The case, therefore, comes within the familiar rule that a release of the principal operates to discharge the surety.

It is further said that Goings may not have been legally charged as an indorser. If this were so, the plaintiff should have replied the fact, as we will not presume it in the face of the acts of both him and the plaintiff to the contrary. The release would not have been necessary on such a supposition.

Judgment for defendants on demurrer; leave to amend on usual terms.

McLEMORE v. POWELL.

Supreme Court of the United States, January, 1827. 12 Wheat. 554.

Mere agreement by the holder with the drawer of a bill of exchange for delay, made without consideration, and not communicated to the indorser, does not discharge the indorser.

The case is stated in the opinion of the court.

STORY, J., for the court. — This is a writ of error to the Circuit Court of the United States for the District of West Tennessee.

The original action was assumpsit, brought by Powell, Fosters, & Co., as holders of a bill of exchange, drawn by one Thomas Fletcher, in May, 1819, at Nashville, upon Messrs. McNeil, Fisk, & Rutherford, at New Orleans, payable to Thomas Read, or order, for $2,000 in sixty days after date, and by him indorsed to the defendant, John C. McLemore, and by him to the plaintiffs. The bill, upon presentment for acceptance, was dishonored, and due notice of the dishonor was given to the defendant.

At the trial, upon the general issue, Thomas Fletcher, the drawer, was, under a release from the defendant, McLemore, examined as a witness, and, among other things, testified that, in the month of October following the dishonor of the bill, 'one of the plaintiffs applied to him at Nashville for the money on the bill, and threatened to sue immediately if an arrangement was not made to pay the bill. The witness then proposed to the plaintiff, if he would indulge him four or five weeks, he would himself, to a certainty, pay the bill. To this the plaintiff agreed, and told the witness he was going to Louisville, Kentucky, and would return by Nashville, about the expiration of that time, and would receive said payment. Since said time the witness has never seen said plaintiff.' The witness further testified that the defendant was an accommodation indorser for him on the bill; that the plaintiff told him that the bill would be left with a Mr. Washington, at Nashville; that he expected he would himself be at that place at the time agreed on, but that, if he did not come, he would give the instructions to Mr. Washington, by letter, what to do if the witness did not pay at the expiration of the time agreed on. It did not appear that any consideration was paid or stipulated for this delay; and no suit was commenced until after this period had elapsed. The district judge instructed the jury that, if they believed the conversation above stated amounted to no more than an agreement that a suit should not be brought for four or five weeks, and that no premium or consideration was

given or paid, or to be paid by Fletcher, the indorsers were not discharged; that an agreement for giving day must be an obligatory contract for a consideration which ties up the hands of the creditor and disables him from suing, thereby affecting the interests and rights of the indorser; that the indorser has a right to require and demand of the creditor to bring a suit against the drawer, and if he has disabled himself from bringing a suit by a contract for a consideration, he has thereby released the indorser; and that if the jury were satisfied from the testimony that time was given for a valuable consideration paid or to be paid, or that a new security was taken by the holder, the indorser was discharged and absolved from all the obligations of the indorsement.

Under this instruction, the jury found a verdict for the plaintiffs, upon which there was judgment given in their favor. A bill of exceptions was taken to the charge of the court; and the present writ of error is brought for the purpose of ascertaining its legal correctness.

It is unnecessary to give any opinion upon that part of the charge which respects the right of an indorser to require the holder to commence a suit against the drawer. In general, the indorser, by paying the bill, has a complete power to reinstate himself in the possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument against all antecedent parties. The same reason, therefore, does not exist, as may in common cases of suretyship, to compel the creditor to active diligence by suit against the principal. Without expressing any opinion on this point, it is sufficient to say that the error, if any, was favorable to the defendant, and, therefore, it can form no subject of complaint on his part.

The case then resolves itself into this question, — whether a mere agreement with the drawers for delay, without any consideration for it, and without any communication with or assent of the indorser, is a discharge

of the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself. And we are all of opinion that it is not. We admit the doctrine that, although the indorser has received due notice of the dishonor of the bill, yet if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But, in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it. An agreement without consideration is utterly void, and does not suspend for a moment the rights of any of the parties. In the present case, the jury have found that there was no consideration for the promise to delay a suit, and, consequently, the plaintiffs were at liberty immediately to have enforced their remedies against all the parties. It was correctly said by Lord Eldon, in English *v.* Darley, 2 Bos. & Pul. 61, that 'as long as the holder is passive, all his remedies remain;' and, we add, that he is not bound to active diligence. But, if the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and, if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him.

The cases proceed upon the distinction here pointed out, and conclusively settle the present action. In Walwyn *v.* St. Quentin, 1 Bos. & Pul. 652, where the action was by indorsees against the drawer of a bill, it appeared that, after the bill had become due, and been protested for non-payment, though no notice had been given to the drawer, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on

account from the indorser; and to an application from the acceptor, stating that it was probable he should be able to pay at a future period, they returned for answer that they would not press him. The court held it no discharge; and Lord Chief Justice Eyre, in delivering the opinion of the court, said that if this forbearance to sue the acceptor had taken place before noticing and protesting for non-payment, so that the bill had not been demanded when due, it was clear the drawer would have been discharged, for it would be giving a new credit to the acceptor. But that, after protest for non-payment, and notice to the drawer, or an equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue the acceptor. He might forbear to sue him. The same doctrine was held in Arundel Bank *v.* Goble, reported in a note to Chitty on Bills. Chitty, 379, note *c*, ed. 1821. There the acceptor applied for time, and the holders assented to it, but said they should expect interest. It was contended that this was a discharge of the drawer; but the court held otherwise, because the agreement of the plaintiffs to wait was without consideration, and the acceptor might, notwithstanding the agreement, have been sued the next instant; and that the understanding that interest should be paid by the acceptor made no difference. So, in Badnall *v.* Samuel, 3 Price's Exch. 521, in a suit by the holder against a prior indorser of a bill of exchange, it was held that a treaty for delay between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place during the negotiation, because there was no binding contract which precluded the plaintiffs from suing the acceptor at any time.

Upon authority, therefore, we are of opinion, that this writ of error cannot be sustained, and that the judgment below was right. Upon principle, we should entertain the same opinion, as we think the whole reasoning upon which the delay of the holder to enforce his rights against the

drawer is held to discharge the indorser after notice, is founded upon the notion that the stipulation for delay suspends the present rights and remedies of the holder.

The judgment of the court below is, therefore,

Affirmed with costs.

Omit

SOHIER *v.* LORING.

Supreme Court of Massachusetts, November, 1850. 6 Cush. 537.

A composition deed, whereby the holder of a bill of exchange gives time to the acceptor, and agrees to discharge him on receiving a portion of the debt, reserving the holder's remedies against other parties to the bill, does not discharge the drawer and indorsers.

This was an appeal from a decision of Ellis Gray Loring, Esquire, a master in chancery, overruling the motion of the appellant, as assignee of Edward H. Green & Company, insolvent debtors, to expunge or reduce the amount of certain claims, proved before the master against the estate of Green & Company.

The case was submitted to the court upon the following agreed statement of facts: On the 23d of February, 1846, a warrant was issued by the said master, against the estate of Edward H. Green and John E. Short, both of Boston, merchants and partners, doing business under the firm of Edward H. Green & Company. The first publication of the notice required by the warrant was made on the 24th of February, 1846, and, on the 11th of March following, the appellant was chosen assignee, and duly received an assignment of all the insolvent's estate.

Previous to their insolvency, Green & Company, as copartners, were employed by Oliver P. Mills, of New York, to make and negotiate certain bills of exchange, drawn on the firm of Major & Wallace, of London; and from time to time, as opportunity offered, Green & Company had drawn on account of Mills various bills of

exchange, against consignments of goods in the hands of Major & Wallace belonging to Mills, which bills were sold in the usual course of business to the appellees. Green & Company, for a commission paid to them by Mills, had become responsible as the drawers or indorsers of these bills, which were duly accepted by Major & Wallace, but were not paid at maturity. Notice of their dishonor was duly sent to the drawers, and the bills were taken up by the appellees, and proved by them against the estate of Green & Company.

The appellees, whose claims were thus proved, Hawes, Gray, & Company, proved on the 10th of March, 1846; Benjamin Loring and Levi H. Marsh, executors of Elijah Loring, proved on the 20th of March; Thomas Tarbell & Company proved on the 29th of April, 1846; and Samuel May & Company proved on the 18th of January, 1847; the whole amounting to about $26,000.

The bills proved by Hawes, Gray, & Company were drawn by Mills payable to his own order, and indorsed by him to the order of Green & Company, and by them indorsed. The bills proved by the other appellees were drawn by Green & Company on account of Mills. All the bills were directed to Major & Wallace, and were by them accepted. The several appellees sent their bills to England in payment of debts or to make purchases there during the months of November and December, 1845; and the bills were at maturity returned to them dishonored, by due course of mail.

At a meeting of the parties holding bills drawn by or by the order of Oliver P. Mills held in London, on the 5th of June, 1846, a proposition for compromising their claims against Major & Wallace on these bills was agreed to; and, on the 23d of December following, an indenture for that purpose was drawn up and executed in London, by Major & Wallace, by these bill-holders, including the appellees, by their respective agents, and by certain trustees appointed under the composition deed. This

composition deed recited that Major & Wallace, being unable to pay in full all their debts, had proposed to pay their creditors, including the parties holding bills drawn by or by the order of Oliver P. Mills and accepted by Major & Wallace, a composition of five shillings in the pound, on the amount of their debts, by three equal instalments, payable at three, six, and nine months from the date of the deed, and to be secured by promissory notes of James Wallace, payable at those periods respectively, in full satisfaction and discharge of such debts; and that their creditors, including said bill-holders, had consented to and agreed to accept such composition; and that the bill-holders had received in addition to this composition four shillings in the pound in money. Major & Wallace by this deed assigned certain goods to certain trustees therein named, in trust to sell and convert the same into money, and divide the proceeds among the bill-holders, parties to the composition deed; and the bill-holders covenanted not to sue Major & Wallace on said bills of exchange, unless on default of payment of the notes of James Wallace; and that upon payment of those notes to the trustees, the bill-holders would release Major & Wallace from the said bills of exchange. Then followed this clause: 'Provided always, and it is hereby expressly agreed and declared, that it shall be lawful for the said bill-holders, parties hereto of the second part, to execute these presents without prejudice to their rights and remedies upon the said bills, mentioned in the second schedule hereunder written, respectively, or upon collateral or other securities for the same, respectively, against any person or persons whomsoever other than the said McKedy Major and James Wallace, or either of them, their or either of their heirs, executors, and administrators; and that notwithstanding these presents, or anything herein contained, they, the said bill-holders respectively, and their respective executors, administrators, and assigns, shall be at liberty to enforce and adopt all or any of such rights or

remedies, against any such other person or persons, in the same manner as if these presents had not been executed.' And the bill-holders covenanted to indemnify the trustees, from all claims for or on account of the goods assigned to them in trust, or the payment of any dividend out of the proceeds thereof.

The dividends, which were made under this indenture, amounting to four shillings in the pound, have been received by the appellees respectively.

On the 4th of August, 1847, the appellant, as the assignee of Green & Company, filed with the master in chancery a written motion, that the claims of the several appellees should be expunged from the list of debts proved against Green & Company; or, if not expunged, that they should be reduced in amount, by deducting therefrom the payments received by the appellees, respectively, under the provisions of the composition deed; but the master, after due hearing, overruled the motion, and the assignee appealed to this court.

It was agreed, that if the court should sustain the master's decision, judgment should be entered for the appellees; but if the court should reverse the decision of the master, the case might be sent to a jury, to be tried on such issue or issues as the court should direct, or otherwise disposed of as they should determine.

The case was argued in writing.

METCALF, J., for the court. — The composition made with the acceptors would have discharged the drawers and indorsers, if there had not been inserted in the composition deed a proviso that it should not prejudice the holders' remedies against any other parties besides the acceptors. Bayley on Bills (2d Amer. ed.), 357, 358. The first question in the case therefore is, what is the legal effect of that proviso?

It is settled in England that a discharge or giving time by a creditor to his principal debtor, will not dis-

charge the surety, if there be an agreement between the creditor and the principal debtor that the surety shall not be discharged. And this rule of law is applicable to parties to bills of exchange and promissory notes, who are liable only on the failure of prior parties, though they are not technically sureties of those parties. 1 Steph. N. P. 936; Montagu on Composition, 36; Burge on Suretyship, 210; Chit. on Bills (10th Amer. ed.), 420; Byles on Bills (2d Amer. ed.), 202. See also Mallet *v.* Thompson, 5 Esp. R. 178. The same doctrine was advanced by Messrs. Hamilton and Riker, in argument, and was recognized by the Supreme Court of New York, in Stewart *v.* Eden, 2 Caines, 121, very soon after it had been laid down by Lord Eldon, in Ex parte Gifford, 6 Ves. 805. In this last case, Lord Eldon said sureties would not be discharged by a discharge of the principal, if there was 'a reserve of the remedy' against the surety, and that Lord Thurlow had so admitted in a previous case not reported. He afterwards laid down this principle more authoritatively in Boultbee *v.* Stubbs, 18 Ves. 20, and Ex parte Carstairs, 1 Buck, 560. In Ex parte Glendinning, 1 Buck, 517, he said: 'If a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between their principal and the creditor.'

In Nichols *v.* Norris, 3 Barn. & Adolph. 41, the Court of King's Bench decided that a composition like that in the present case, made with the indorser of a note given for his accommodation, did not discharge the maker. It was said by the court, that such composition deeds were very common, and that the special proviso took the case out of the common rule as to the discharge of sureties by giving time to the principal.

In 1846, the case of Kearsley *v.* Cole, 16 Mees. & Welsb. 128, came before the Court of Exchequer. That was an action for money paid for the defendant, for whom the

plaintiff had been surety. The defence was, that the defendant had made an assignment to his creditors, who had covenanted not to sue him. But it appeared that there was a proviso, in the deed of assignment, that any creditor might execute it without prejudice to any specific lien or security, or to any claim against any surety, and that this proviso was inserted with the knowledge and consent of the plaintiff. He was afterwards called on as surety of the defendant, and paid the claim. The question was, whether this payment was to the use of the defendant, or was a voluntary payment, which gave him no right to reimbursement. The court held that the plaintiff was entitled to recover; he not having been discharged from his suretyship by the deed of assignment. The opinion of the court was given by Mr. Baron Parke, who fully and clearly stated the decisions, and the principles upon which they were made, as follows: 'The question is, what is the effect of a discharge with reserve of remedies consented to by the surety? We do not mean to intimate any doubt as to the effect of a reserve of remedies without such consent; and the cases are numerous that it prevents the discharge of a surety, which would otherwise be the result of a composition with, or giving time to, a debtor, by a binding instrument; and the reserve of remedies has that effect upon this principle, — first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if, the instant afterwards, the surety enforces those rights against him; and his consent that the creditor shall have recourse against the surety is, impliedly, a consent that the surety shall have recourse against him. This is the effect of what Lord Eldon says in Ex parte Gifford, and Boultbee *v.* Stubbs, as to the reserve of remedies; and the general proposition, that,

with that recourse, the composition or giving time does not discharge the surety, is supported by those and the following cases: Ex parte Glendinning; Nichols *v.* Norris; Smith *v.* Winter, 4 Mees. & Welsb. 454, and others. This point must, therefore, be considered as settled. Some remarks have, indeed, been made by Lord Denman, in the case of Nicholson *v.* Revill, 4 Adolph. & Ellis, 675, on the doctrine of Lord Eldon in Ex parte Gifford, throwing doubt on its correctness, on the supposition that Lord Eldon had held that a creditor could *release* one joint and several debtor, and hold another liable by a reserve of remedies; which would certainly be against the decision in Cheetham *v.* Ward, 1 Bos. & Pul. 630, unless the instrument of release could, by reason of the context, be construed to be a covenant not to sue, as it was in the case of Solly *v.* Forbes, 2 Brod. & Bing. 38. But we consider it clear that Lord Eldon meant only to apply the doctrine to cases where there was *no release*, but a composition, or giving time, not amounting to a *release*, which is the present case; and, with reference to it, the rule laid down by Lord Eldon is not impeached by Lord Denman's remarks.' And the decision of the court was, that the surety's consent to the creditors' reserve of their remedy against him did not alter the law of the case in favor of the principal.

These doctrines were incidentally recognized by Mr. Justice Wilde in American Bank *v.* Baker, 4 Met. 175, and were adopted and applied by the Court of Appeals of Maryland, in Clagett *v.* Salmon, 5 Gill & Johns. 314.

It is very obvious, that a principal debtor may gain little or nothing by such a composition as this with his creditor; inasmuch as he is left liable to the like proceedings against him by his sureties, which his creditor might have instituted if no composition had been made. But if he pleases to subject himself to that liability, by voluntarily executing an agreement which has that effect, there is no legal reason why he should not be held to that agreement.

On these grounds, we are of opinion that the holders of the bills, in the present case, were rightly permitted by the master to prove their claims thereon against the drawers and indorsers; the latter not having been discharged by the composition made by the former with the acceptors.

The second question respects the amount which the holders were entitled to prove against the drawers and indorsers. And we are of opinion that each was entitled to prove the full sum due and unpaid, at the time of making proof, on the bill or bills held by him. This question is not settled by any provision in our insolvent laws; and we therefore adopt the rule applied in bankruptcy. That rule is, that a holder may prove his claim, under commissions against the drawer, acceptor, and indorser, and receive a dividend from each upon his whole claim, provided he does not receive, in the whole, more than his full due. But there is a distinction in this case, when a holder applies to prove his debt against one party, after having received a part of it from another, and when he applies to prove before receiving any payment or composition from another party, or before a dividend has been declared in his favor, under a commission against another party. Any sum actually received in payment, from any party to a bill, before proof made against another, must be deducted from the amount to be proved against any other party. So, as a general rule, must the amount of a dividend, declared on the estate of another party, be deducted. Cooper *v.* Pepys, and Ex parte Wildman, 1 Atk. 107, 109; see 5 Ves. (Perkins's ed.) 449, note; Eden's Bankr. Law 2d ed.), 155; 1 Mont. & Ayrt. Pract. in Bankruptcy, 202, 203.

In the present case, we regard the composition made with the acceptors, on the 23d of December, 1846, as payment of one fifth of the amount of the bills. The acceptors then conveyed property in trust to pay one fifth, and the holders accepted that conveyance. But all the holders,

except May & Company, made proof of their claims against the estate of Green & Short, drawers or indorsers, before they made the composition with the acceptors, and were therefore entitled, according to the rule just stated, to prove the full amount then due on their bills. May & Company having made proof after they had executed the composition deed, by which they, in legal effect, had received part payment from the acceptors, were entitled to prove only the amount due after deducting that payment.

The proceedings of the master, from which this appeal was taken, are affirmed in all things, except as to the amount proved by May & Company, which is to be reduced by deducting the sum received by them under the composition with the acceptors.

FARMERS' AND MECHANICS' BANK *v.* RATHBONE.

Supreme Court of Vermont, 1852. 26 Vt. 19.

One who for value has taken a bill of exchange accepted for the accommodation of the drawer, without notice of the fact, may afterwards release the drawer without discharging the acceptor, though he then have notice of the nature of the acceptance.

Assumpsit on two bills of exchange for $600 each, accepted by the defendant, payable to order and indorsed before maturity, for value and without notice, to the plaintiff. Defence, that the bills were accepted without consideration for the accommodation of the drawer, Caleb E. Barton, and that the plaintiff released and discharged the drawer after having acquired knowledge of the nature of the acceptance. The release was long after the plaintiff's purchase of the bills.

The said release was as follows:

'In consideration of $500 to the Farmers' and Mechanics' Bank, paid by Caleb E. Barton, of Charlotte, the said bank hereby wholly release and discharge the said Barton

from all liability or indebtedness to said bank, which said bank have or may claim to have for, or on account of, any and all notes, cheques, drafts, or bills of exchange or acceptances to which Henry Rathbone is in any wise a party, either as maker, drawer, indorser, or acceptor or payee or drawee, and also from all liability on any paper which has been sued against said Barton in favor of said bank, or any other paper said bank may have against Barton, previous to the 17th of March instant, which said Rathbone was or is any wise a party to.

'In witness whereof, we have hereunto affixed the seal of said bank, at Burlington, this thirtieth day of March, A.D. 1848.

(Signed) 'FARMERS' AND MECHANICS' BANK. [L.S.]
'By JOHN PECK, Pres't.'

The County Court rendered judgment for the defendant. Exceptions by plaintiffs.

ISHAM, J., for the court. — This action is brought on two bills of exchange, drawn by Caleb E. Barton on the defendant, Henry Rathbone, of the city of New York; both of which were duly accepted, and, before maturity, were discounted, and transferred by indorsement to the plaintiffs. When the bills matured, they were dishonored, duly protested, and notice thereof given to the drawer.

On the trial of the case, at the circuit, the defendant insisted that the bills were accommodation bills; and, upon the facts stated in the bill of exceptions, he now insists that the bills are of that character, that the drawer is the person primarily liable, that the acceptor stands as his surety, and that the release of the drawer by the plaintiffs operates as a discharge of the defendant as acceptor. It is admitted that if these bills are not accommodation bills, but are really bills for value, the release will not affect the liability of the acceptor. It will discharge all persons intermediate between the holders and

drawer, but not those prior on the bills, nor those on whom rests a primary or absolute liability to pay them. English *v.* Derby, 2 B. & P. 61; Bailey, J., in Claridge *v.* Dalton, 4 Moore & S. 226; Chitty, Bills, 451.

We are satisfied that these bills are not to be treated as accommodation papers. It is true the fact is found in the case, 'that, at the maturity of the bills, the drawer was indebted to the acceptor on account, apart from the bills in suit, and that the latter had no funds in his hands of the former, wherewith to meet them.' But, in connection with this statement, it equally appears from the exceptions that, during the season of 1844, the drawer at different times consigned to the defendant as commission merchant, for sale on his account, a quantity of cheese, the gross proceeds of which amounted to $7,848.78; and, from the statement in the account of sales, we perceive that a much larger amount than the sum of these bills was realized therefrom, after these acceptances were given. The account arising from the sale of this property commenced in July, 1844, and closed in November of that year. There has been no statement of that account rendered, or balance ascertained by the parties. As between them, the whole account remains open and subject to their future liquidation. While this account was accruing, these bills were drawn and accepted, obviously and with the understanding that they were to be paid by the defendant, and the amount so paid be entered into their general account.

During that period they doubtless anticipated that the balance would be sufficient to pay these bills, and have been respectively disappointed in the amount finally realized therefrom; so that there is now a balance due the acceptor, as stated in the account of sales. But as these bills, at first, were drawn upon property consigned to the acceptor, and he accepted them with the same means of knowledge which the drawer had, and thereby assumed the primary obligation to pay them, there is no propriety

in treating the bills otherwise than as creating obligations of that character, after they have passed, in due course of business, into the hands of an indorsee. In so treating them, we are manifestly carrying into effect the mutual intention of the parties when the bills were drawn and accepted; for it is distinctly stated in the case that both the drawer and the drawee supposed and believed that there were funds sufficient in the hands of the drawee to pay them at maturity, and under that belief the drawer made such representations to the plaintiffs, at the time of their indorsement and discount.

The legal effect and character of bills of exchange, so drawn and accepted, is not changed or affected by any alteration of the balance of the account, nor even by the fact, if it should be afterwards ascertained, that there was an indebtedness, at the time of the acceptance, from the drawer to the acceptor. This principle is fully illustrated by the case of Bagnall *v.* Andrews, 7 Bing. 217. Indeed, the facts in that case, and the principles there established, have such a direct application to this case, that we cannot consider these bills otherwise than as bills for value, without entirely disregarding the authority and principles of that decision. In that case, when the bill was drawn, the drawer had an open account with the acceptor, for goods which he was in the course of sending to him for sale; neither of them at that time knew the state of the account; 'and it afterwards turned out that the drawer was, at the time of the acceptance, indebted to the acceptor, instead of the acceptor being indebted to the drawer.' Before the bill became due, the drawer became bankrupt, and indorsed the bill to the plaintiff, who was ignorant that an act of bankruptcy had been committed. The drawer being called as a witness was objected to as being interested, on the ground that this was an accommodation bill, and that, if the plaintiff recovered, he would be responsible to the defendant, not only for the amount of the bill, but for the costs of that suit. Tindal, C. J., after remarking that

such consequences would follow if this was an accommodation bill, and that the witness would be incompetent, observed 'that, we think, upon the facts in the case, the bill was not an accommodation bill. At the time it was drawn, the drawer had an open account with the defendant for goods sent, and which he was then in the course of sending to him for sale. The drawer might, at that time, reasonably expect that the acceptor would pay the bill out of funds that might be in his hands, when the bill arrived at maturity; for the evidence is express that, at the time the bill was drawn, neither the drawer nor acceptor knew the state of the account. A bill so drawn and accepted cannot be treated as an accommodation bill, nor, consequently, is there any implied obligation, on the part of the drawer, to indemnify the acceptor against the costs of any action which may be brought against him.' 1 Phil. Evid. 61; 9 Serg. & Rawle, 237.

If that case is to be treated as sound in principle, it makes a final disposition of the case under consideration; for under that authority, these bills cannot be considered as accommodation bills, but must be treated as bills for value; the acceptor being the party primarily liable, and the drawer considered only as his surety or guarantor. In such case, it was properly remarked that the release of the drawer was a relinquishment merely of so much security which the plaintiffs had for the payment of the debt, and which in no event can affect the liability of the acceptor.

It is very evident, also, that the plaintiffs could have sustained no action against the drawer of these bills, unless they had been duly protested and notice given. This principle is founded on the consideration that a primary liability for their payment rests only upon the acceptor; while that of the drawer is contingent and collateral, and arises upon the default of the acceptor. The necessity of protest and notice in such cases is not avoided by a fluctuating balance in their accounts, nor even by the fact, where there exists an open account, that there is an

indebtedness from the drawer to the acceptor. Orr *v.* Maginnis, 7 East, 359; Blackhaw *v.* Doren, 2 Camp. 503; In re Brown, 2 Story's C. C. 502, 521; Story, Bills, § 311; 2 Smith's Lead. Cas. 29; Smith's Merc. Law, 315; 15 Peters, 393.

But if these bills are to be regarded strictly as accommodation bills the same result, we think, must follow. In such case it is insisted that the drawer is the person primarily liable; that the acceptor is to be treated as his surety; and that the holder of the bills is bound so to regard and deal with them, notwithstanding the terms of the bill, whenever he has notice that the acceptance was for accommodation, whether that notice was received at the time he took the bills or at any subsequent period.

It is proper to observe that this question does not now arise between the drawer and acceptor; as between them the consideration may be inquired into and the true relation of the parties shown; but the question is presented in a case between the acceptor and an indorsee for value without notice that the bill was for accommodation at the time he became the holder. When these bills were received by the plaintiffs, they were invested with those legal rights, and became subject only to those duties, that arose from what appeared on the face of the bills. Their legal effect and the relative liability of the drawer and acceptor could not be changed or altered by any fact not then appearing.

These principles have a peculiar application to bills of exchange, as they are designed for commercial purposes; and their application is required to impart to them that credit and currency which is necessary to insure the purposes for which they were intended. At the time the plaintiffs became indorsees they had the right, on the one hand, and were bound, on the other, both at law and in equity, to regard the acceptor as primarily liable, and the drawer as his surety; they could have released, compounded

with, or given time to the drawer, without in any way affecting their right to hold the ultimate liability of the acceptor. Story, Bills, §§ 429, 430; 15 Peters, 393; 1 Mees. & W. 374. Such being their right at the time they became the holders of the bills, there is no propriety or authority in saying that that right can be subsequently changed, or affected by a mere notice from the acceptor to the holder that the drawer had neglected to provide funds for the payment of the bills; or by any act of the drawer and acceptor to which the plaintiffs were not a party, and to which they have never given their assent. Theob. on Pr. & Sur. 216.

The plaintiffs, as holders of these bills, were not subject to any of the equities existing between the original parties, and without their assent those equities cannot be imposed upon them. The case of Mallet *v.* Thompson, 5 Esp. 178, was an action by an indorsee against the maker of an accommodation note for the payee. The holder received part-payment, under a composition from the payee, and covenanted not to sue him, which is a virtual release, knowing when he received the bill that it was given for accommodation. Lord Ellenborough ruled that the maker was liable, notwithstanding the payment and release; for his liability on the face of the note was primary and principal, and that of the indorsers was collateral and secondary; and, whatever may be their liabilities between themselves, such was their liability to the holder. It was also held that the release would have no effect between the maker and payee; for whatever the maker was compelled to pay he might call upon the payee to repay; the release in no way disturbed their relations. On the application of the same rule to this case, whatever the acceptor may be compelled to pay, he can call upon the drawer to repay, notwithstanding the release; for their relations are not disturbed by its execution. It is evident, also, in this case, from the release itself, that a discharge of the bill was not intended by the parties, but simply a

release of the drawer, by the holders, from any farther claim which they had personally on him, leaving the holders to pursue their remedy against the acceptor as the party primarily liable. Story, Promissory Notes, § 423.

In the case of Laxton *v.* Peat, 2 Camp. 185, and Collett *v.* Haigh, 3 Camp. 281, a different doctrine was applied to accommodation bills, where the holder, at the time he received the bills, knew that they were for the accommodation of the drawer. Lord Ellenborough remarked 'that as it was an accommodation bill, of which all parties had notice, the acceptor can only be considered as a surety for the drawer;' and the acceptor was discharged by time being given the drawer. If these cases can be sustained on principle, they have no application to this case; for it may be said with more propriety that if one take a bill of exchange, knowing at the time that it was for accommodation, he thereby assents to receive and hold it subject to that equity of the parties; while no such suggestions can be made in this case, as these plaintiffs had no such notice when the bills were received and discounted.

The doctrine of those two cases was, however, subsequently shaken by Justice Gibbs, in Kerrison *v.* Cooke, 3 Camp. 362, and was afterwards overruled in the Common Pleas, in the case of Fentum *v.* Pocock, 5 Taunt. 192, in which Mansfield, C. J., observed 'that the case of Laxton *v.* Peat was the first in which it was held that the acceptor was not the first and last person compelled to pay the bill to the holder; and that they were compelled to differ, and hold that it is impossible to consider the acceptor of an accommodation bill in the light of a surety for the drawer; and that, if the holder had known in the clearest manner that at the time of giving the bill it was for accommodation, it would make no manner of difference.' With this view of the case, Heath, J., and Chambre, J., agreed. It will be at once perceived that in this case the acceptor was held as the principal and primary debtor on an accommodation bill, known to be such by the holder when he

received it, and that act of the holder, which would have discharged a surety, was held not to affect his liability. We are not called upon in this case to approve or disapprove of the doctrine of that case to the extent to which it was carried; but it is a decided authority for saying that an indorsee for value of a bill of exchange, who became such before its maturity and in ignorance that it was given for accommodation, has a right to treat all parties thereon as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and that this right is unaffected by any subsequently acquired knowledge that the bill was given for accommodation. In such cases, it is regarded as a mere truism to say that a release of the drawer by the holder has no effect on the ultimate liability of the acceptor.

The case of Fentum *v.* Pocock has been sustained and approved by the subsequent cases in England. Price *v.* Edmonds, 10 Barn. & C. 578, 584; Nichols *v.* Norris, 3 Barn. & Adol. 41; Harrison *v.* Courtauld, 3 Barn. & Adol. 36; Rolfe *v.* Wyatt, 5 Car. & P. 181; Moody & M. 14; Yallop *v.* Ebers, 1 Barn. & Adol. 698, 703. It is to be observed also that the same view of the subject is entertained by the different elementary authors. Chitty, Bills, 344; Smith's Merc. Law, 332; 3 Kent's Com. 104; Bayley, Bills, 364; Story, Promissory Notes, §§ 418, 423.

This subject has arisen before many of the courts in this country, and the rule is generally sustained 'that the parties to a bill or note are bound by the character which they assume upon the face of the bill. If by that they are liable as primary debtors or as principal, then, as to the holders, they are bound as such; and his knowledge at the time when he takes the bill that they or either of them are accommodation parties will not vary the case.' Montgomery Bank *v.* Walker, 9 Serg. & Rawle, 229; s. c. 12 Serg. & Rawle, 382; White *v.* Hopkins, 3 Watts & Serg. 99; Lewis *v.* Hanchman, 2 Barr, 416; Commercial

Bank *v.* Cunningham, 24 Pick. 270, 275; Church *v.* Barlow, 9 Pick. 547, 551; In re Babcock, 3 Story's C. C. 393; Sanford *v.* Lambert, 2 Blackf. 137; Clopper, Adm'r, *v.* Union Bank of Maryland, 7 Har. & J. 92.

In the case of Claremont Bank *v.* Wood, 10 Vt. 582, where several, some of whom were sureties, signed a note, 'each as principals,' and promised to pay, it was held that, as to the holders, they were to be regarded as principals, and not as sureties; and yet the primary liability of the acceptor, and the secondary liability of the drawer, is as expressly set forth on these bills as if it were written out in full over their respective signatures. In either case, to vary their respective liabilities, as they have assumed them on the face of the bills and notes, would be to vary and control their intended operation, and, in effect, to enforce a contract which the parties never made.

On this subject, it is important to observe a material distinction between joint and several promissory notes or obligations, and bills of exchange or notes on which the parties have assumed only successive liabilities. In the former case, as between the makers and the holders, who at the time received the note with notice of the circumstances under which it was given, the strict relation of principal and surety may exist, and evidence of that fact is not considered as contradicting its specific provisions, but as consistent with its terms; and the right of contribution arising out of that relation exists between them. 2 Am. Lead. Cas. 289, 303, in notes. But the drawer and acceptor and indorsers of a bill or note have not assumed a joint and several liability, neither are they strictly sureties, but are liable to each other in the order of their becoming parties; and when the action is on the bill or instrument, creating such successive liabilities by an indorsee for value, without notice that the bill was given for accommodation, such testimony is inadmissible for the purpose of converting their successive liabilities into a joint and several obligation, or placing them in the rela-

tion of principal and surety. The testimony clearly contradicts the express provision of the bill, and materially changes its legal effect. Unquestionably those liabilities may be changed as between the parties by an express contract to that effect, which may be enforced between them. But this in no way affects the rights of a holder, who, at least, became such in ignorance of that arrangement. Under such circumstances the holder has only to look to the bill itself, and the genuineness of the signatures, to ascertain the nature and extent of the liability of the parties thereon; and they are liable to him in the successive order in which their names appear upon the face of the bill. McDonald *v.* Magruder, 3 Peters, 471; Flint *v.* Day, 9 Vt. 345; Brown *v.* Mott, 7 Johns. 361.

This doctrine is sustained in Story's Treatise on Promissory Notes, in which, § 418, he observes, that 'the strong tendency of the more recent authorities is to hold that, in all cases, the holder has a right to treat all the parties to a bill as liable to him exactly to the same extent and in the same manner, whether he knows or not the note to be an accommodation note; for, as to him, all the parties agree to hold themselves primarily or secondarily liable, as they stand on the note; and that they are not at liberty, as to him, to treat their liability as at all affected by any accommodation between themselves.' And in § 483, he farther says: 'Nor would it make any difference in the case that the released party was, in point of fact, the party ultimately bound to pay the note, and that the other party was a mere accommodation maker, payee, or indorser, for his benefit; or, at least, it would not make any difference, unless the fact of its being such accommodation note were, at the time of receiving the note, and not merely at the time of the release, known to the holder.' Story, Bills, §§ 291, 368, 432, 434. Chancellor Kent (3 Kent's Com. 104) also observes, that 'the acceptor of a bill is the principal debtor, and the drawer the surety, and nothing will discharge the acceptor but payment or a release.

Accommodation paper is now governed by the same rules as other paper. This is the latest and the best doctrine, both in England and this country.'

As these bills were received and discounted by the plaintiffs before their maturity, without notice that they were for accommodation, we are satisfied, from the authorities, that they had a right to treat the acceptor as the principal debtor, and the drawer as liable only on his default. In such cases, there is no difference between accommodation bills and bills for value: in either case, a release of the drawer from any farther liability to the holder will have no effect, as a discharge of the acceptor from his primary liability on the bill; and this right so to treat the parties on the bill remains unaffected by any notice subsequently given that the bill was for accommodation.

It is insisted, however, that the release of the drawer will in equity discharge the acceptor, and that the principles which prevail in that court are now equally available at law. From an examination of the cases in chancery, we entertain a decided conviction that the same principles, on this subject, prevail in equity as at law. If any diversity of opinion exists in that court on this question, it has arisen more from a misapprehension of the rule at law, and a desire to conform to the principles there established, than from any rules prevailing in equity at variance with them. There is much propriety in this; for the principles regulating bills of exchange have their origin in mercantile usage, and have been adopted to meet the exigencies and wants of commercial transactions; it is therefore equally the policy of courts of equity, as of courts of law, to make the application of and enforce those principles, in relation to these securities, which experience has found necessary, to preserve their negotiability and credit.

In the case of the Bank of Ireland *v.* Beresford, 6 Dow, 233, Lord Eldon expressed his opinion of the case of Fentum *v.* Pocock, and observed that, ' if it went on the principle that inquiry is not to be made into the know-

ledge of the party, but that all shall be taken as appearing on the face of the bill, I think it a most wholesome doctrine.' The case is important only, as showing the individual opinion of Lord Eldon on that question, and as showing that no different rule had then prevailed in chancery. In the case of Glendinning, ex parte, 1 Buck, 517, Lord Eldon refused to adopt the principle of the decision of Fentum *v.* Pocock, and recognized the general doctrine as held in Laxton *v.* Peat. That was the case of an accommodation acceptance, and known to be such, by the holder, when he received the bill. We are, therefore, not called upon to approve or disapprove of the doctrine of that case; for in this case the plaintiffs had no notice, when the bills were received and discounted, that they were for accommodation.

If the plaintiffs in this case had received the bills with knowledge that they were given for accommodation, we do not say but that the defence would be available; for when one takes a bill, even before maturity, with notice of a given fact, it is not unreasonable that he should be charged with the consequences that result therefrom as if the bill had been received overdue. But that principle does not apply, when the bill is taken before maturity, without notice and for value; for the bill is then held independent of all equities existing between the original parties; and Lord Eldon, in that case, nowhere intimates that the principle would have such an application. It is only to the case of an accommodation bill, and known to be such by the holder when he received the bill, that he made the application of that rule.

The case, however, which should and does exert a controlling influence in our decision of this case is that of Harrison *v.* Courtauld, 3 Barn. & Adol. 36. That case, it will be perceived, was sent from chancery by the Master of the Rolls, for the opinion of the Court of King's Bench. This circumstance alone creates the inference that, in relation to bills of exchange, on which the parties have

assumed successive liabilities, the principles of equity are the same as at law, and that, if the acceptor of these bills is not discharged at law, he would not be in equity; for it would be an idle proceeding for chancery to send a case to a court of law to ascertain the principles prevailing there, unless those principles have equal application in chancery. In that case, as we have assumed in this, the bill was accepted for the accommodation of the drawer, and was indorsed for value before its maturity. In that case, as in this, the holder was ignorant at the time he received the bill that it was given for accommodation, but was afterwards informed of that fact, before the act was done which the acceptor claimed operated as his discharge. It will at once be perceived how very similar are the two cases in every important particular. On the hearing of that case, the decisions at law and in equity were considered; and all the judges — Tenterden, C. J., and Parks, Taunton, and Patterson, JJ. — certified to the Court of Chancery that the acceptor was liable on the bill the same as on a bill for value.

Whether, therefore, we apply to this case the principles prevailing in equity or at law, the result is the same. The plaintiffs having no notice at the time they received the bills that they were given for accommodation had a right to treat the drawer as collaterally liable thereon, and the acceptor as the principal and primary debtor; and this right of the holder remains unaffected by any subsequent knowledge which he may have that they were for the accommodation of the drawer. Under such circumstances, the release of the drawer in no way affects the liability of the defendant as acceptor. This view of the case renders it unnecessary to pass upon other questions which were urged in the argument of the case.

The result is, that the judgment of the County Court must be reversed, and the case remanded.

MADISON SQUARE BANK *v.* PIERCE.

Court of Appeals of New York, March, 1893. 137 N. Y. 444.

The maker of a negotiable promissory note, executed for value, cannot set up part payment by an indorser thereof not made on the maker's behalf.

Action against the maker of a negotiable promissory note. Payment in part, by an indorser, set up in defence pro tanto. Judgment for the plaintiff, for the whole sum. The facts are stated in the opinion of the court, second paragraph.

FINCH, J., for the court. — We have a novel and interesting question before us on this appeal, although its apparent importance will lessen as we pass from first impressions to some slower reflection. It arises upon facts which are very brief and simple, and may at once be stated.

The defendant Pierce made his promissory note payable to his own order and indorsed it to the Bates Co., Limited, which indorsed it to the plaintiff bank; the latter discounting and paying the proceeds over to the immediate indorser. Thereafter the Bates Co. became insolvent and passed into the hands of a receiver, who paid to the bank, upon the liability of the indorser, seventy-three and one-quarter per cent. of the amount secured by the note. Later the bank sued Pierce the maker, and recovered judgment for the full amount of the note in spite of the proof showing the payment made by the receiver, and in disregard of the claim asserted by the defendant that he should only be held liable for the balance remaining unpaid. That judgment has been affirmed by the General Term, Judges Daniels and Barrett each writing very strong and valuable opinions in support of their doctrine, and relying upon the authority of Jones *v.* Broadhurst, 9 C. B. 173, 67 Eng. Com. L. 175, which fully warrants their conclusion. The question does not seem ever before to have arisen in this country, and we are left at

liberty to examine the English rule and to follow it or not as we approve or disapprove its logic and its consequences.

We are not to regard the note as being accommodation paper, but must assume its transfer for value. The form of the transaction is equivalent to what it would have been if the Bates Co. had been named as payee, and loses none of its force by the intervention of the maker as first indorser. That indorsement, in the form adopted, was needed for the regular transfer of title, but does not change or affect the nature and character of the maker's liability. He remains the ultimate debtor, the person who ought to pay the debt, in preference to and in exoneration of all the other parties to the paper, who in some form or other are entitled to have final recourse to him. And it is to the case of such a maker of the note or such an acceptor of the bill of exchange that the English rule alone applies, and it is explicitly declared inapplicable where the indorser or drawer is the real debtor, although in form only secondarily liable.

Pierce therefore was the ultimate debtor, and the party who ought to pay the note, both in discharge of the obligation to the holder and in exoneration of the indorser. When the bank sued on the note, it was the legal holder and the legal party in interest. Upon production of the paper and the usual proof, judgment against the maker for the full amount was inevitable, unless some defence should be interposed. The only possible one for Pierce was part payment, and he was compelled to assert, and his counsel are compelled to argue, that the money paid by the indorser to the holder inured to the benefit of the maker as a payment on his debt. But that doctrine cannot prevail for very obvious reasons. The indorser's payment did not in the least lessen or satisfy the maker's debt. He owed it all exactly as before. What had happened possibly changed somewhat the real creditor, but left the whole amount due and unpaid. To whom he should pay might become a new question, but how much he should pay in discharge of the note was not made doubtful in any degree. What the receiver advanced

to the holder is familiarly described as payment; but it was such relatively to the indorser's liability alone; while relatively to the obligation of the maker it was an equitable purchase instead of a payment. That view of it was taken in a very early case, the decision of which depended necessarily upon it. In Callow *v.* Lawrence, 3 Maule & S. 95, it appeared that one Pywell drew a bill upon Lawrence to his own order, which Lawrence accepted. The drawer indorsed the bill to Taylor, who discounted it and thereafter indorsed it to Barnett. It was protested for non-payment. The drawer paid Barnett the full amount and took the bill, and striking off the indorsements of Taylor and Barnett, transferred the bill to Callow, who sued the acceptor upon it. The latter claimed that the bill was paid and extinguished, which the court denied, saying that the drawer 'became the purchaser of the bill' when he paid and took it up out of Barnett's hands; that it was not paid by the drawer animo solvendi, — in order to extinguish it, but only to redeem himself from the situation in which he stood. That must always be true of payment by indorser to holder, where the maker is the ultimate debtor. To the extent of the money paid the indorser becomes equitably entitled to be substituted to the rights and remedies of the holder, and becomes pro tanto the beneficial owner of the debt; so that the maker's obligation to pay the note in full, at first due to the holder solely in his own right, becomes, after the part payment by the indorser, still wholly due to the holder, but partly in his own right and partly as trustee for the indorser. A court of law cannot split the note into parts, and must act upon the legal interest and ownership.

In the present case there was no privity between maker and indorser as it respects the action of the latter. He paid, not as the agent of the maker, not at his request, not for his benefit, and under no duty to relieve him, but independently, upon his own obligation, to lessen his own responsibility, and not at all to discharge the ultimate debt which it was the maker's duty to pay. It seems very clear

therefore that the maker cannot utilize for his own benefit a payment which, as to him, is not a payment upon the debt. It becomes, as I have said, merely a question to whom he shall pay and who may sue for and collect the whole unpaid sum. In that question the maker has no concern beyond the inquiry whether he may become liable to different persons for the same debt and encounter the danger of paying it twice. I can discover no such peril. The judgment in favor of the holder is a bar to any other suit on the same note, and payment to the holder discharges the note utterly. Ordinarily the indorser cannot recover except upon the note, and as holder, and in accordance with the law merchant. If he ever has any other right of action against the maker, it is either in equity or by force of some facts beyond the bare relation established by the paper. And where the note is merged in the holder's judgment, or paid in full to him by the maker, the indorser's only right is through the judgment or against the proceeds if he has made a partial payment to the holder. That does the indorser no wrong. If he is not content that the holder shall collect to some extent as his trustee, he may prevent it by payment in full to the holder and so entitle himself to the possession of the note on which to sue, or, if judgment has been obtained, to be subrogated to all of the rights of the plaintiff therein.

I think this result is clearly indicated by our own decisions. In Mechanics' Bank *v.* Hazard, 13 Johns. 353, the maker of the note had been arrested in an action upon it, and his bail sought to relieve themselves by force of a payment made by the indorser to the holder, but such effect was denied to it; the court saying that it was not a payment by or on behalf of the maker, or of which he or his bail could avail themselves. And in Guernsey *v.* Burns, 25 Wend. 411, where the suit was by the holder, representing the legal title and interest, it was said to be no defence to the maker, and no concern of his, that some property in the note was in another.

It thus becomes apparent that there is no very great importance in the question which method of securing payment from the maker is adopted, since the same result follows from each, and that it narrows down to the inquiry whether as matter of correct doctrine and of convenience in practice the holder may recover the whole debt against maker or acceptor for himself and as trustee for the indorser to the extent of his acquired interest; or whether he shall take judgment only for the balance, leaving the indorser to sue in some way and on some theory, which apparently could not be upon the note because already merged in the judgment, but might be for money paid for the use of the maker, since he gets the benefit of it in the reduction of the judgment, as was held in Pownal *v.* Ferrand, 6 Barn. & C. 439, where the holder deducted the indorser's payment from the levy against the maker. The former seems to me to be the logical and convenient method, and so I think we should follow the English doctrine.

I have not underrated the assault made upon it by the appellant. He asserts that Jones *v.* Broadhurst is contrary to the earlier cases, and has been criticised and shaken by the later ones. I have examined them all, with some wonder at the amount of learning and ingenuity expended upon the subject. Pierson *v.* Dunlop, Cowp. 571; Walwyn *v.* St. Quentin, 1 Bos. & P. 652; Bacon *v.* Searles, 1 H. Bl. 88; Hemming *v.* Brook, Car. & M. 57; Randall *v.* Moon, 12 C. B. 261; Cook *v.* Lister, 13 C. B. N. S. 543; Solomon *v.* Davis, 1 Cahabe & Ellis, 83; Thornton *v.* Maynard, L. R. 10 C. P. 695. The prior cases were very fully and carefully reviewed by Baron Cresswell,[1] in the opinion rendered in Jones *v.* Broadhurst; and of the subsequent cases I deem it only necessary to say that along with some criticism and doubt, the doctrine has remained substantially unshaken, and the case last cited was declared by Lord Coleridge to be the accepted law.

It must not be forgotten, however, and I may prudently

[1] A slip for Cresswell, J.

repeat, that the doctrine has no application to accommodation paper, and rests wholly upon the actual and ultimate indebtedness of maker or acceptor as the party who ought to pay. In such a case as that, which correctly describes the one now before us, and where no disturbing facts affect the relations of the parties as fixed by the paper itself, I think the holder may sue and recover the full amount, receiving so much of the proceeds as represents a part payment by the indorser as trustee for him.

It follows that the judgment should be affirmed with costs.

All concur, except Maynard, J. dissenting.

Judgment affirmed.

SWOPE *v.* ROSS.

Supreme Court of Pennsylvania, 1861. 40 Penn. St. 186.

The drawee of a bill not accepted by him may discount the same before maturity and thus become holder of the paper. Such proceeding is not a payment.

Assumpsit upon the following case stated:

Ross Forward gave to Swope & Karns the following instrument of writing: —

'SOMERSET, PA., August 18, 1859.

'George Ross & Co., bankers, pay to Swope & Karns or order, ninety days from date, six hundred and sixteen dollars.

'ROSS FORWARD.'

On or about the 1st of September thereafter, Swope, one of the firm of Swope & Karns, delivered this paper (indorsed Swope & Karns) to the plaintiffs' bank, had the same discounted, and received the money thereon, less the discount, $16.40. At the time this check was given, and when it was discounted at the bank, Ross Forward was

one of the firm of George Ross & Co., but went out on the 19th of September, 1859. When the day of payment named in the check came round, Forward had no funds in the bank, and the paper was regularly protested for non-payment on the 19th of November, 1859.

If the court be of the opinion that, on the above state of facts, the plaintiffs are entitled to recover, the judgment to be entered in favor of plaintiffs for $616, with interest from Nov. 9, 1859; otherwise judgment for defendant with costs. Judgment for plaintiffs. Writ of error.

STRONG, J., for the court. — The question presented by the case stated is quite novel, and we have not been able to find that it has been adjudicated. Undoubtedly the acceptor of a bill of exchange is the principal debtor, and the drawer and indorsers are but sureties. Of course the acceptor, even after payment, cannot sue either the drawer or indorser of the bill unless his acceptance was supra protest. His payment of the bill extinguishes it, but the case stated finds that the plaintiffs discounted the bill for the payees before it became payable, not that they accepted it or paid it. Discounting a bill, though it be done by the drawee, is neither acceptance nor payment. Acceptance is an engagement to pay the bill according to its tenor and effect when it becomes due, not before. A bill is paid only when there is an intention to discharge and satisfy it. In Burbridge *v.* Manners, 3 Camp. 194, Lord Ellenborough said 'that even payment of a bill before it became due does not extinguish it any more than if it were merely discounted,' and added that 'payment means payment in due course and not by anticipation.' His lordship evidently thought that discounting a bill by a drawee is neither payment nor extinguishment. In Attenborough *v.* McKenzie, in the English Court of Exchequer, 36 Eng. L. & Eq. 562, it was held that, if the acceptor of a bill discounts it, he may reissue it so as to charge the drawer; that nothing will discharge the drawer but payment; i. e., payment

when due, or payment for the purpose of discharging and satisfying the bill. Therefore, if the acceptor discounts the bill for the drawer and then indorses it away, the drawer will be liable upon it to the holder, and the transfer by the drawer to the acceptor will operate as an indorsement, although at the time the drawer does not intend to transfer by way of indorsement, being under the impression that the bill is discharged by coming into the hands of the acceptor. Nor will the payment of the amount less the discount be deemed a payment of the bill by the acceptor. In that case the holder of the bill took it by indorsement after it was due, from the transferee of the acceptor. The ruling goes to the length that even the accepting drawee of a bill may take it as an indorsee, and as such may issue it. It also decides that he does take it as an indorsee when he discounts it. Can then the drawee of a bill, payable on time, who has discounted it, maintain an action on it against the drawer or indorser if it be protested for non-payment and notice be given? He is not a party to the bill until he has accepted it. Until then, he has not assumed the position of principal debtor, nor undertaken any obligation in regard to it. His discounting has neither paid nor extinguished it, and it is not a promise to pay according to its tenor and effect. Is he precluded from becoming an indorsee by the fact that the bill was directed to him? It seems well settled that the drawee of a bill may accept or pay it, supra protest, for honor of the drawer or indorser, and if he takes it up he stands in the position of an indorsee paying full value for it, has the same remedies to which an indorsee would be entitled against all prior parties, and can of course sue the drawer or indorser. Chitty, Bills, 375. In such cases the fact that the bill was drawn upon him does not incapacitate him from acquiring the rights of an indorsee. No reason is apparent for a different rule where the drawee becomes the holder by discounting the bill before its dishonor. Uncertain whether the drawer will put funds into his

hands to meet the bill at maturity, he may well refuse to accept, and yet may discount it on the credit of both the drawer and indorser. If he does not accept, he is as much a stranger to it as any other person discounting it for the drawer or indorser; is but purchasing the contract, and the contract thus purchased is that the drawee will pay the bill on presentment, when it shall fall due, or, in case of his failing to do so, that the parties whose names are already upon it will pay, if due notice of its dishonor be given to them. The promise is made by the parties to the bill. The purchaser enters into no engagement.

These views accord with the doctrine laid down in Desha, Sheppard & Co. *v.* Stewart, 6 Ala. 852, a case which more closely resembles the present than any we have been able to find. In it the Supreme Court of that State ruled that the drawees of a bill may sue the drawer or indorsers after it has been dishonored, even though they obtained the bill before its dishonor; and that until acceptance they are strangers to the bill, and may acquire rights to it, and stand in the same condition as any other holder. It was said that there is no legal presumption if the drawer comes into possession of the bill previous to its dishonor, that he takes it with the obligation to accept.

Such being in our opinion the law, it was not error that the Court of Common Pleas gave judgment for the plaintiff upon the case stated. The fact is not distinctly found that notice of dishonor of the bill was duly given to the defendants, but it was conceded on the argument that such was the fact, and that such is the meaning of the case stated. The judgment is

Affirmed.

WHEELER v. GUILD.

Supreme Court of Massachusetts, October, 1838. 20 Pick. 545.

Payment by the maker before maturity, to the holder of a negotiable note not entitled to receive payment thereof, if not followed by surrender of the note, will not protect the maker.

The case is stated in the opinion of the court.

SHAW, C. J., for the court. — The facts of this case present a very important question for the consideration of the court. Whatever affects the negotiability and the free currency of promissory notes and bills of exchange is of the utmost importance to a mercantile community, the business of which is to a great extent transacted through the medium of these instruments.

The facts which may be deemed material are these: The plaintiff became the holder of the note in question by regular indorsement for valuable consideration, soon after it was made, being a note dated September 1, 1833, payable in three years, with interest, and the last indorsement being in blank. Within a year from the date of the note, to wit, in March, 1834, the plaintiff, John Wheeler, as surety, joined with Daniel G. Wheeler in three promissory notes, one to Brigham & Goodrich, attorneys and partners, in Worcester, one to Tappan & Co., and one to Stewart & Co., of New York, for both of which parties Brigham & Goodrich were agents and attorneys. On that occasion, the plaintiff, John Wheeler, delivered to Brigham & Goodrich, as collateral security to his three joint and several promises, the note in question, indorsed in blank, and took their receipt, specifying that it was so received, and to be by them held, as collateral security for the payment of those notes. In September, 1835, these three notes had been fully paid. Though Brigham and Goodrich were in partnership as attorneys-at-law, yet

Brigham was engaged in much other business, and had many separate negotiations, and the business in question had been done in the partnership name, but in fact by Goodrich. In December, 1835, the plaintiff applied to Goodrich for the note, who then produced and exhibited it from a file of private papers, where it had been kept by him, and he would then have given it up to the plaintiff, but the plaintiff had not his receipt with him to exchange for it. In the mean time, before this application of the plaintiff to Goodrich, viz., on the 28th of November, 1835, Brigham had received of Stafford, one of the firm of A. H. Guild & Co., and one of the defendants, $500 to pay the note in question, describing it as a note payable in September, 1836, and gave him a receipt, in his separate name, signed D. T. Brigham, stating that the $500 had been received in full payment of the note, and the note to be delivered up to Stafford. Soon after the application of the plaintiff to Goodrich above stated, viz., about the 24th of December, Stafford, one of the defendants, producing Brigham's receipt, applied to Goodrich for the note, who declined giving it, on the ground that Brigham had no right to receive pay for and discharge the note; and by mutual consent it was placed in the custody of a gentleman, for the use of the party having the better title to it, by whom it was produced in this court on the trial.

Some inferences are to be drawn from this evidence, which may have a bearing on the case; but we think they are plainly deducible from the circumstances stated, and they are these: That Goodrich did not assent to the payment received by Brigham, and did not in fact know of it till after he had been applied to by the plaintiff for the note; that Goodrich had the actual possession and custody of the note; and that, at the time that Brigham received the money and gave the receipt, he not only did not produce or exhibit the note, but that he had not the actual custody of it, nor was it so amongst the partnership papers as that it was in the actual joint custody of the parties as

partners. If he had it in his possession, or had regular access to it in the ordinary way of business, there is no reason why he did not deliver it up to Stafford, instead of giving him a receipt, and a promise to deliver it.

The law in regard to bills of exchange and promissory notes is so framed as to give confidence and security to those who receive them for valuable consideration, in the ordinary course of business, when payable to bearer or indorsed in blank, so as to be transferable by delivery; and in general a party taking such a bill under such circumstances has only to look to the credit of the parties to it, and the regularity and genuineness of the signatures and indorsements. So that if such a bill or note be made without consideration, or be lost or stolen, and afterwards be negotiated to one having no knowledge of these facts, for a valuable consideration and in the usual course of business, his title is good, and he shall be entitled to receive the amount. Miller *v.* Race, 1 Burr. 452; Peacock *v.* Rhodes, 2 Doug. 633; Grant *v.* Vaughan, 3 Burr. 1516. The credit which the law thus attributes to notes and bills of exchange which are transferable by delivery arises mainly from the confidence inspired by the actual custody and possession, and the actual delivery of the security upon such negotiation. To so great an extent is this principle carried, that in regard to bank-notes, and in most respects in regard to all other bills and notes transferable by delivery, the title and the possession are considered to be inseparable. And it will be presumed that the party thus in possession of a bill holds it for value, until the contrary appears; and the burden of proof is on the party impeaching his title. Collins *v.* Martin, 1 Bos. & Pul. 648.

But these rules are adopted with this limitation, that the party thus taking the note or bill does it in the ordinary course of trade, when not overdue or otherwise dishonored by anything apparent upon the face of it, and without notice that it had been lost or stolen, or that the holder had obtained it wrongfully, or had no just right to

receive it in the way of business. Paterson *v.* Hardacre, 4 Taunt. 114. If one takes a note or bill with actual notice that it has been lost by the owner, he cannot hold it against the true owner. Lovell *v.* Martin, 4 Taunt. 799.

It has been argued that where a party has a legal title by indorsement and delivery, and the actual possession of the bill or note, although he holds without any just right to negotiate or collect it, still, as he has a legal title, a transfer from him will vest a legal title in another, and authorize such other to take for his own use. But this consequence, we think, does not follow. The true ground is expressed by Eyre, C. J., in the case above cited, Collins *v.* Martin. He says: 'For the purpose of rendering bills of exchange negotiable, the right of property passes with the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods.' In another part of his judgment, in assigning the reason why a person thus having a legal title may not enforce the collection of the bill, whether he has given value for it or not, he says: 'If it can be proved that the holder gave no value for the bill, then he is in privity with the first holder, and will be affected by everything that affects the first. This all proceeds upon an argumentum ad hominem. It is saying, you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience.' The same reasoning applies to other cases, where a party has the custody of a bill, without any just right or lawful authority to collect or negotiate it, as where it has been lost or stolen, or embezzled from the true owner, or intrusted to an agent, for a special purpose only; if these facts are known to the party receiving it, he is in privity with the party from whom he receives it, and cannot be heard in a court of justice, though having a legal title to enforce an inequitable and unjust demand. Such a case is not within the reason of the rule, which is designed only to protect bills and notes when taken in

good faith, in the course of business. If a note is paid, not in the usual course of business, or to a person having the custody, but not authorized to receive payment, and that known to the party paying, though the note be given up, it is no discharge against the true owner. Kingman *v.* Pierce, 17 Mass. 247.

So payment of a bill or check, before it is due, will not be a discharge unless made to the real proprietor of it; and therefore where a banker, contrary to usage, paid a check the day before it bore date, which had been lost by the payee, it was held that he was liable to repay the amount to the person losing it. Da Silva *v.* Fuller, Sel. Cas. 238, cited in Chitty, Bills, 6th Eng. ed. 148. In this case, although the holder had the legal title arising from the possession of the check, yet he was not bona fide the holder with authority to collect, and, as the banker paid it out of the usual course of business, he paid it at the risk of being obliged to pay it again, if the party presenting it had not just right to receive it.

Most of the same principles and reasons apply alike to transfers and to payments. We think the rules deducible from the cases are these: Where a party takes a bill transferable by delivery, not overdue nor otherwise apparently dishonored, for valuable consideration, in the usual course of business, and without notice, actual or constructive, that the holder came by it unlawfully or without title, and has no just right to collect and receive it, the party taking it shall hold it as a valid security, notwithstanding that it has been lost by the true owner, or stolen from him, or taken by the holder as a mere agent to keep, or for other special purpose, without any authority to collect or transfer it; otherwise he shall not be deemed to have a good title to hold and enforce payment of it or to withhold the bill itself or the proceeds of it from the party justly entitled. Bleaden *v.* Charles, 7 Bing. 246. The same rule applies to payments: if a bill be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal

title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But in both cases faith is given to the holder mainly on the ground of his possession of the bill, ready to be surrendered or delivered, and the actual surrender and delivery of it upon the payment or transfer. If, therefore, upon such payment, the holder has not the actual possession of the bill ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment; and if it turns out that the party thus receiving had not a good right and lawful authority to receive and collect the money, but that another person had such right, the payment will not discharge the party paying, but will be a payment in his own wrong; he must pay the bill again to the right owner, and must seek his redress against the party receiving his money, on the pretence that he had a right to receive it as the holder of the bill, when in fact he had no such right.

Applying these principles to the present case, the court are of opinion that the payment made by Stafford to Brigham, under the circumstances, did not operate as a payment and discharge of this note, and that the plaintiff is entitled to recover.

The plaintiff was the holder of this note by indorsement, before it was pledged to Brigham & Goodrich, and had the complete legal and equitable title to it, and the whole beneficial interest in it. Being transferable by delivery, when transferred to Brigham & Goodrich, they took the legal title, with a right to collect it, and apply the proceeds to the payment of the notes, for the security of which it was pledged, if they should not be otherwise paid. But when those notes were paid, all right of Brigham & Goodrich to transfer or collect it ceased, and they had the mere naked possession of it for the plaintiff, to be surrendered on demand. Now whatever might have been the effect of an actual surrender and delivery of this note

to one of the promisors, on receiving payment, it is very clear that, according to all the rules applicable to this subject, without surrendering and delivering up the note, the payment must be considered as made at the risk of the party paying; and, as the party receiving in fact had no right to receive payment, such payment and receipt did not discharge the note, as against the true owner. It is not necessary to consider whether Brigham was acting in his partnership capacity or not; because, after the purpose was accomplished for which the note was pledged to the partners, they had no just right or lawful authority to transfer or collect the note as against the plaintiff. If they had jointly transferred it in the due course of business, although their transferee without notice might have held it, it would be in virtue of the law which protects such transfers to a party without notice, in order to give effect to the currency of bills and notes, and not because Brigham & Goodrich had any right or lawful authority. If therefore they had given a transfer in writing with a promise to deliver the note, not delivering or producing it, no title would have passed as against the plaintiff, because such transfer without delivery would not be within the reason or principle of the rule.

But we think the other point is equally decisive. Brigham not only did not produce or exhibit the note, but he had not the actual custody or possession of it. He did not profess to act for the partnership, but signed the receipt in his own name. Had Brigham and Goodrich, as partners, been the true holders of the note, or if they had had a joint authority to collect it, it may well be admitted that the act of one or the receipt of one would bind both. But all the right and authority which they ever had over the note, except to give it back to the plaintiff, agreeably to their contract, had ceased. A receipt of one therefore in his own name, and not purporting to be for the use of both, was not within the scope of the partnership authority, and did not bind his partner. The defendant Stafford

gave credit to Brigham only. For though his receipt purports to be not merely executory, but a present discharge of the note, yet as he had no authority to discharge it, either by himself, or for himself and partner, and as he had not the note to surrender and give up, the legal effect and operation of his receipt was an executory undertaking that he would procure a discharge of the note and surrender it. The consequence is, that Stafford paid his money to the wrong person, and must look to him for an indemnity.

Besides, the note was not paid in the due course of business. It was paid many months before it was due; the full sum was not paid, there being more than two years' interest due on the notes, which was wholly relinquished; no notice was given to Goodrich, the partner who transacted the business of taking these notes, and giving the receipt for them, and who had the actual custody of this note, all of which would be strong evidence to go to a jury, to establish the fact of constructive notice to Stafford that Brigham had no right, either in his own name or as a partner with Goodrich, to receive payment of, or to discharge this note. But the other grounds are sufficient, without relying upon these circumstances.

The grounds upon which the court place their judgment are these: The plaintiff had once a good title to the note. It was delivered to Brigham & Goodrich, for a special purpose, which was accomplished. After that, Brigham & Goodrich had a mere naked custody of the note for the plaintiff and had no right or lawful authority either to negotiate or collect it; a fortiori, Brigham alone had no such authority. The defendant, Stafford, was not lawfully called upon to pay Brigham, as having the possession and custody with a prima facie title, because he had no such custody or possession, and the note was not due. Stafford was not deceived into taking the note by the production and delivery of it, because it was not delivered or produced; if he paid it therefore to Brigham, without

having [taken] up his note, he did it on the faith that Brigham had good right to receive payment and discharge it, and of course under the liability to pay it over again to the rightful proprietor, if Brigham had not such right. In fact and law, Brigham had no such right, but the plaintiff was at the time the rightful proprietor, and of course the defendants obtained no discharge by such payment, but upon the maturity of the note they were bound to pay it to the plaintiff. The note having been put by Mr. Goodrich into the hands of a common friend, for the use of the party entitled, and the plaintiff having shown himself entitled, the note was rightly brought in by the person to whom it was thus intrusted, as evidence for the plaintiff.

Judgment for plaintiff.

AYMAR *v.* SHELDON.

Supreme Court of New York, October, 1834. 12 Wend. 439.

The question of the liability of indorsers of a foreign bill of exchange drawn and payable in a foreign country, but indorsed in New York, upon protest for non-acceptance and notice thereof, without further steps at maturity, turns upon the laws of New York.

Error from the Superior Court of New York city. The action was by indorsees against indorsers of a bill of exchange drawn in the French isle of Martinique upon a house in Bordeaux, France, payable at twenty-four days' sight to the order of B. Aymar & Co., the defendants, and by that firm indorsed to the plaintiffs in the city of New York, both plaintiffs and defendants being citizens of the United States. The bill was duly presented to the drawees for acceptance, and acceptance was refused. Whereupon the bill was protested for non-acceptance, and notice thereof given to the defendants.

Pleas, (1) non-assumpsit; and (2) that the bill was drawn in Martinique, an island subject to France, that it was payable in France by subjects of that kingdom, that, by

the laws of France, on protest for non-acceptance the indorsers and drawer are bound to give security for the payment of the bill when due, and at maturity the holder is bound to present the bill if payable at one or more days after sight, for payment, and in case of dishonor must protest the same for non-payment, and is not excused by reason of the protest for non-acceptance, and that there had been no protest for non-payment. The defendants also pleaded (3) that on notice of protest for non-acceptance they were ready and willing to give security, according to the laws of France, and offered to do so.

To the second plea the plaintiffs demurred; on the third they took issue. The second plea was adjudged bad, and the case went to trial upon the issues of fact. Verdict for the plaintiffs on the first plea, and for the defendants on the third.

Nelson, J., for the court. — The only material question arising in this case is, whether the steps necessary on the part of the holders of the bill of exchange in question, to subject the indorsers upon default of the drawees to accept, must be determined by the French law or the law of this State. If by our law, the plaintiffs below are entitled to retain the judgment; if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed.

We have not been referred to any case, nor have any been found in our researches, in which the point now presented has been examined or adjudged. But there are some familiar principles belonging to the law merchant, or applicable to bills of exchange and promissory notes, which we think are decisive of it. The persons in whose favor the bill was drawn were bound to present it for acceptance and for payment according to the law of France, as it was drawn and payable in French territories; and if the rules of law governing them were applicable to the indorsers and indorsees in this case, the recovery below could not be

sustained, because presentment for payment would have been essential even after protest for non-acceptance. No principle, however, seems more fully settled, or better understood in commercial law, than that the contract of indorser is a new and independent contract, and that the extent of his obligation is determined by it.

The transfer by indorsement is equivalent to the drawing of a bill, the indorser being in almost every respect considered as a new drawer.[1] Chitty on Bills, 42; 3 East, 482; 2 Burr. 674–5; 1 Strange, 441; Selw. N. P. 256. On this ground the rate of damages in an action against the indorser is governed by the law of the place where the indorsement is made, being regulated by the lex loci contractus.[2] 6 Cranch. 21; 2 Kent's Comm. 460; 4 Johns. R. 119. That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, has been adjudged both here and in England. In Hix *v.* Brown, 11 Johns. 142, the bill was drawn by the defendant, at New Orleans, in favor of the plaintiff, upon a house in Philadelphia; it was protested for non-acceptance, and due notice given; the defendant obtained a discharge under the insolvency laws of New Orleans after such notice, by which he was exonerated from all debts previously contracted, and, in that State, of course from the bill in question. He pleaded his discharge here, and the court say: 'It seems to be well settled, both in our own and in the English courts, that the discharge is to operate according to the lex loci upon the contract where it was made or to be executed. The contract in this case originated in New Orleans, and had it not been for the circumstance of the bill being drawn upon a person in another State, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as drawer of the bill, in consequence of the non-acceptance.

[1] See Bills and Notes (Students' Series), 75, 76 [2] Id. 254.

The whole contract or responsibility of the drawer was entered into and incurred in New Orleans. The case of Peters *v.* Brown, 5 East, 124, contains a similar principle. See also 3 Mass. R. 81; Van Raugh *v.* Van Arsdaln, 3 Caines, 154; 1 Cowen, 107; 6 Cranch, 221; 4 Cowen, 512, *n.*'

The contract of indorsement was made in this case, and the execution of it contemplated by the parties, in this State; and it is therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the *drawer* are to be determined and settled according to the law of the place where the bill is drawn, are equally applicable to the *indorser;* for, in respect to the holder, he is a drawer. Adopting this rule and construction, it follows that the law of New York must settle the liability of the defendants below. The bill in this case is payable twenty-four days after sight, and must be presented for acceptance; and it is well settled by our law that the holder may have immediate recourse against the indorser for the default of the drawee in this respect. 3 Johns. R. 202; Chitty on Bills, 231, and cases there cited.

Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract,[1] there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation;[2] and it is therefore to be presumed that the parties had reference to it. So the protest must be according to the same law, which is

[1] See Bills and Notes (Students' Series), 249. [2] Id. 252.

not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made;[1] such being an implied condition. Chitty on Bills, 266, 93, 217; Bayley, 28; Story's Conflict of Laws, 298.

The contract of the drawers in this case, according to the French law, was that if the holder would present the bill for acceptance within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested and notice given of the protest, he would give security to pay it, and pay the same, if default was also made in the payment by the drawee, after protest and notice. This is the contract of the drawers, according to this law, and the counsel for the plaintiffs in error insist that it is also the implied contract of the indorser in this State. But this cannot be, unless the indorsement is deemed an adoption of the original contract of the drawers, to be regulated by the law governing the drawers, without regard to the place where the indorsement is made. We have seen that this is not so; that notice must be given according to the law of the place of indorsement; and if, according to it, notice of non-payment is not required, none of course is necessary to charge the indorser. But if the above position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the drawer controlling. The above position of the counsel would also be irreconcilable with the principle that the indorsement is equivalent to a new bill drawn upon the same drawer; for then the rights and liabilities of the indorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country in which they were at the time of entering their respective obligations.

[1] See Bills and Notes (Students' Series), 253.

I am aware that this conclusion may operate harshly upon the indorsers in this case, as they may not be enabled to have recourse over on the drawers. But this grows out of the peculiarity of the commercial code which France has seen fit to adopt for herself, materially differing from that known to the law merchant. We cannot break in upon the settled principles of our commercial law to accommodate them to those of France or any other country. It would involve them in great confusion. The indorser, however, can always protect himself by special indorsement, requiring the holder to take the steps necessary, according to the French law, to charge the drawer. It is the business of the holder, without such an indorsement, only to take such measures as are necessary to charge those to whom he intends to look for payment.

Judgment affirmed.

CARTER *v.* THE UNION BANK.

Supreme Court of Tennessee, April, 1847. 7 Humph. 548.

Whether demand of payment of a foreign bill of exchange may be made by a notary's deputy depends upon the law of the place in which the bill is payable.

The case is stated in the opinion.

GREEN, J., for the court. — This is an action against the plaintiff in error, as the indorser of a bill of exchange drawn in Memphis, Tennessee, by Arthur Bowen, on Fort & Wilcox, New Orleans, in favor of the plaintiff in error, for $2,500, and by him indorsed. The bill was presented at maturity, payment demanded, and was protested for non-payment, by A. B. Cends, a notary public of New Orleans. The instrument of protest states that the notary 'by his deputy McDime, junior, presented said draft to Mr. Fort, one of the members of the firm of Fort & Wilcox, the acceptors, at their office, and demanded payment thereof, and was an-

swered that the same would not be paid.' The protest was made the 11th June, 1845.

By an Act of the General Assembly of Louisiana, passed the 14th of March, 1844, it is made lawful, for each and every notary public in New Orleans, to appoint one or more deputies to assist him in making of protests and delivery of notices of protests of bills of exchange and promissory notes; provided that each notary shall be responsible for the acts of each deputy employed by him; and provided that each deputy shall take an oath faithfully to perform his duties as such, before the judge of the parish in which he may be appointed; and provided the certificate of notice of protest shall state by whom made or served.

The defendant at the trial below objected to the protest which was offered as evidence, which objection was overruled by the court, and the evidence was admitted. The jury found a verdict for the plaintiff, and the defendant appealed to this court.

It is now insisted that this protest is not evidence of the presentment and demand of the bill, because it states that the demand was made by the deputy of the notary.

It is certainly true, as the general rule, that a foreign bill must be presented by the notary in person, and demand of payment made by him, and that the demand by his deputy is not sufficient. But it is seen that the law of Louisiana, where the bill was payable, authorizes the employment of a deputy in this service, and that the protest must certify by whom the demand was made.

In Story on Bills, § 276, treating of protests of foreign bills, it is laid down, that the protest 'should be made out and drawn up in the form required by the law or usage of the place where it is made, and that so essential is the production of the protest that it cannot be supplied by mere proof of noting for non-acceptance and a subsequent protest for non-payment.' And Mr. Chitty observes (Chitty on Bills, 333): 'Wherever notice of non-acceptance of a foreign bill is necessary, a protest must also be made, which, though mere

matter of form, is by the custom of merchants indispensably necessary, and cannot be supplied by witnesses or oath of the party, or in any other way, and, as it is said, is a part of the constitution of a foreign bill of exchange.' The mere production of this protest, in the case of a bill payable and protested out of the country, will be evidence of its dishonor, 'and to it all foreign courts give credit.' And at p. 456, he says: 'With respect to the protest, it should always be made according to the law of the place where the payment ought to have been made, though with regard to notice of dishonor, it must be given to the drawer within the time, and according to the laws of the place where the bill was drawn, and to the indorsers according to the law of the place where the indorsements were made.'

These authorities settle the question, and establish the following propositions: 1. That a protest is indispensable to the dishonor of a foreign bill of exchange; 2. That the protest is to be made according to the law of the place where the bill is payable; 3. That the protest, properly authenticated, is evidence by its mere production of the presentment and demand, in all foreign courts where the dishonor of the bill is required to be proved; 4. That no other evidence of the facts stated in the protest is competent.[1]

The protest in the present case was made according to the law of Louisiana, where the bill was payable, and therefore is evidence here of the dishonor of the bill.

It is objected that there is no evidence that Memphis was the defendant's place of residence. It appears that, annexed to the name of the defendant on the bill, is added 'Memphis, Tennessee.' This we regard as part of his indorsement, and as sufficient authority to authorize the holder to send the notice to Memphis.

Affirm the judgment.

[1] See Bills and Notes (Students' Series), 107.

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